(1)

91-380

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

J. GERARD HOGAN, *et al.*,
Petitioners,

v.

MARK E. MUSOLF, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

---

PETITION FOR A WRIT OF CERTIORARI

EUGENE O. DUFFY*
GREGORY W. LYONS
MARK S. POKER
O'NEIL, CANNON & HOLLMAN, S.C.
111 East Wisconsin Avenue
Milwaukee, WI 53202-4803
(414) 276-5000
Attorneys for Petitioners

* Counsel of Record

September 5, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Where a state's courts otherwise entertain actions under 42 U.S.C. § 1983, may plaintiffs be required to exhaust state administrative remedies before bringing a state court suit under § 1983, in which the facial constitutionality of a state taxing scheme is challenged, and declaratory and injunctive relief are sought, and damages from state taxing officials in their individual capacities are sought?

2. If exhaustion of state administrative remedies may be required as a condition of bringing a § 1983 action involving a state tax in state court, is the exhaustion requirement excused either where the administrative remedy is wholly inadequate or where the exhaustion of the administrative remedy would be futile?

PARTIES TO THE PROCEEDING

The parties to the proceedings in the Wisconsin Supreme Court were: (1) Petitioners J. Gerard Hogan, Delores M. Hogan, Jerome S. Poker, Margaret H. Poker, on behalf of themselves and on behalf of all others similarly situated; * and (2) Respondents Mark E. Musolf, Michael Ley, Karen A. Case, in their individual capacities, and Respondent Mark D. Bugher, individually and in his official capacity as secretary of the State of Wisconsin Department of Revenue.

---

* The class certified by the trial court includes approximately 25,000 similarly situated civilian and military annuitants of the federal government whose federal pensions were subject to taxation by Wisconsin. Transcript of Record ("TR") 14.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES AND CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. ———

J. GERARD HOGAN, *et al.*,
Petitioners,

v.

MARK E. MUSOLF, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

---

PETITION FOR A WRIT OF CERTIORARI

J. Gerard Hogan, Delores M. Hogan, Jerome S. Poker and Margaret H. Poker, on their behalf and on behalf of all others similarly situated, respectfully petition this Court for a writ of certiorari to the Supreme Court of Wisconsin.

OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin (App. A, *infra* at 1a-22a) is reported at —— Wis. 2d —, 471 N.W.2d 216. The opinion of the Court of Appeals of Wisconsin (App. B, *infra* at 23a-37a) is reported at 157 Wis. 2d 362, 459 N.W.2d 865 (Ct. App. 1990). The order of the trial court (App. C *infra* at 38a-44a) is unpublished.

JURISDICTION

The Supreme Court of Wisconsin issued its opinion on June 26, 1991 reversing the Wisconsin Court of Appeals and denying petitioners' entitlement to prosecute this § 1983 action. App. D at 46a. This petition is, accordingly, filed within the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

4 U.S.C. § 111 provides in pertinent part:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

28 U.S.C. § 1341 provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

The Supremacy Clause of the United States Constitution, Article VI, Cl. 2 provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall

> be the supreme Law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.

The Due Process Clause of the United States Constitution, Amendment XIV, § 1, provides in relevant part:

> . . . [n]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

Pertinent provisions of Wisconsin's statutory scheme of administrative remedies for income taxes are set forth in App. E, *infra*.

STATEMENT OF THE CASE

This case arises in the wake of the Court's decision in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989). In *Davis*, this Court held that state taxing schemes which discriminate in favor of local and state retirees and against federal retirees are invalid under 4 U.S.C. § 111. Wisconsin, like Michigan and approximately twenty other states, exempted the benefits of many retired employees of state and local government from state income taxation while taxing federal pensions in full. App. A at 3a-4a.

On April 17, 1989, the petitioners, who are retired federal employees, commenced this class action suit in a Wisconsin state court challenging the constitutionality of Wisconsin's discriminatory scheme and seeking, *inter alia*, declaratory and injunctive relief under 42 U.S.C. § 1983 to enjoin the continued enforcement of Wisconsin's scheme. The trial court preliminarily enjoined Defendant Bugher and his agents from prospectively exacting taxes under § 1983 or otherwise enforcing the scheme. The Wisconsin Supreme Court upheld the trial court's ruling that violations of 4 U.S.C. § 111 are actionable under 42 U.S.C. § 1983. App. A at 5a-6a. However, it concluded that federal law permits Wisconsin to require

the petitioners to exhaust administrative remedies before commencing a § 1983 action and dismissed the petitioners' § 1983 action. App. A at 21a.

After commencing the action, petitioners moved the trial court for declaratory relief, preliminary injunctive relief and certification of the plaintiff class. TR. 4. The defendants responded by filing a motion to dismiss, asserting various jurisdictional and affirmative defenses, including that the petitioners had failed to state a cause of action under § 1983 and had failed to exhaust administrative remedies. TR. 5. The trial court determined as a threshold matter that petitioner's cause of action under 42 U.S.C. § 1983 was valid and actionable, that Wisconsin state courts have concurrent jurisdiction over § 1983 claims and that declaratory and injunctive relief as well as money damages are available remedies under § 1983.[1] App. C, *infra*. The trial court further held that the holding in *Felder v. Casey*, 487 U.S. 131 (1988), relieved the petitioners of the burden of exhausting administrative remedies. The trial court also found at the hearing that there is a reasonable probability that petitioners were not required to exhaust administrative remedies because such an undertaking would be futile.[2] App. C at 39a-40a. The trial court then declared that Wisconsin statute § 71.01(1)(a) (1987-88) violates 4 U.S.C. § 111 and held for purposes of preliminary injunctive relief only that there is a "reasonable probability that Wisconsin's scheme violates the United States Constitution." The respondents have not contested the trial court's holding that the taxing scheme is invalid.

---

[1] Wisconsin was one of the first states to recognize its constitutional obligation to hear claims under 42 U.S.C. § 1983. *See Terry v. Kolski*, 78 Wis.2d 475, 254 N.W.2d 704 (1977).

[2] At the time of the hearing, the Joint Finance Committee of the Wisconsin legislature had rejected remedial legislation which would have prospectively extended equal treatment to federal retirees. TR. 13.

The trial court also found that the petitioners had established a reasonable probability of success on the merits and that, absent the interim relief sought, the petitioners would suffer irreparable harm. App. C at 40a. As a consequence of its finding, the trial court preliminarily enjoined the defendants from prospectively exacting taxes or otherwise enforcing the discriminatory scheme. *Id.* at 41a-42a. The trial court further ordered that any funds unlawfully collected by the respondents from the date of the order forward would be held in constructive trust until the merits of the case have been decided.[3]

The trial court, in further exercise of its discretion, concluded that, based upon the fact that this action involves over 25,000 federal civilian and military retirees, all of whom possess identical legal claims against the same defendants, this case was proper for class certification under § 803.08, Wis. Stats. In fact, in certifying the petitioner class the trial court specifically found that:

> In view of the nature of the rights in issue in this case, and the fact that this extremely large class consists, in substantial part, of elderly class members, the court is of the view that it is *compelled*

---

[3] The trial court's preliminary injunction relieved federal retirees of the obligation to make estimated tax payments on June 15, 1989. *See* Wis. Stat. § 71.09. The trial court's order also protects *all* members of the class' rights from further abridgement by precluding Defendant Bugher from imposing any liability under the scheme, including issuing a determination to assess a liability, until the constitutional issues in this case have been decided on the merits. TR. 14. *Cf. Tully v. Griffin, Inc.*, 429 U.S. 68, 75 (1976). In response to the trial court's injunction, in August of 1989, remedial legislation was enacted which provides for equality of treatment for federal pensions paid in 1989 and subsequent years. *See* 1989 Wisconsin Act 31, § 1817m. However, this subsequent legislation in no way precludes the defendants from collecting taxes, imposing fines and penalties or otherwise enforcing the discriminatory taxing scheme for all years open under the statute of limitations.

> to exercise its discretion in favor of certifying the class *in order to protect the constitutional interests here involved.*

App. C at 41a (emphasis added).

Before the merits of this case could be heard by the trial court, the Wisconsin Court of Appeals granted the defendants' petition for leave for an interlocutory appeal of the trial court's order. On August 1, 1989, the Court of Appeals stayed all further proceedings in the case pending the appeal. TR. 28.

The Wisconsin Court of Appeals affirmed the trial court's order, holding that the trial court had jurisdiction over the action and that it properly exercised its discretion in granting the preliminary injunction and certifying the class. App. B at 37a. The Court of Appeals, noting that this was a state court action, rejected the defendants' assertions that *Felder* justified the dismissal of the action because it involved a tax statute and that principles of comity recognized by this Court in *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981), barred jurisdiction.

The Wisconsin Supreme Court granted the defendants' petition to review the Court of Appeals decision. In a published decision, dated June 26, 1991, the court reversed the Court of Appeals.[4] The court concluded that since, in its view, petitioners have a plain, adequate and complete state remedy, the petitioners are not entitled to invoke the remedy granted to them by Congress. It, therefore, reversed the Court of Appeals and dismissed the petitioners' § 1983 cause of action. App. A at 21a. It further ruled that petitioners' 1983 damages claims were "irrelevant", until state remedies are exhausted. *Id.* at 17a.

---

[4] The Wisconsin Supreme Court affirmed the Court of Appeals' decision that violations of 4 U.S.C. § 111 are actionable under § 1983.

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Wisconsin presents a question of far-reaching importance: whether, where a state's courts entertain actions under 42 U.S.C. § 1983, the state may impose an administrative exhaustion requirement on a § 1983 cause of action which involves an issue of state taxation?[5] This is a recurring question as to which the courts of several states are sharply divided, and therefore, warrants this Court's review. The Wisconsin Supreme Court's conclusion that § 1983 causes of action involving tax issues are not judicially enforceable in the first instance conflicts not only with the decisions of other state Courts but also with decisions of this Court. Several of this Court's decisions involving the assertion of § 1983 claims in state court are based on the settled principles that such causes of action are judicially enforceable in the first instance and that Congress did *not* assign to state courts a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action. Moreover, the decision of the Wisconsin Supreme Court in this case conflicts with the landmark rule of *Ex parte Young*, 209 U.S. 123, 159-60 (1908).

The importance of the issue presented by this case was underscored by Justice Kennedy last term when he observed:

> Today's decision raises far more questions about the proper conduct of challenges to the validity of state taxation than it answers.

Dennis v. Higgins, —— U.S. ——, 111 S. Ct. 865, 880 (1991) (Kennedy, J., dissenting).[6]

---

[5] This case does *not* involve the issue of whether a state is a person for purposes of § 1983 resolved in *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989). App. B at 30a.

[6] *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234, n.7 (1987). *See also Howlett v. Rose*, —— U.S. ——, 110 S. Ct. 2430, 2444, n.20 (1990). ("Virtually every State has expressly or

Petitioners respectfully submit that this case is an appropriate case in which to resolve these important questions.

I. THERE IS A CONFLICT AMONG THE STATES

In reaching its conclusion that Wisconsin may limit the right of petitioners to vindicate their rights under 42 U.S.C. § 1983, in a case involving state taxes, the Supreme Court of Wisconsin implicitly acknowledged that there is a split of authority on the question. App. A 20a.[7] Its result is the same as that reached in *Nutbrown v. Munn*, 311 Or. 328, 811 P.2d 131 (1991); *Linderkamp v. Bismarck School Dist.*, 397 N.W.2d 76 (N.D. 1986); *Stufflebaum v. Panethiere*, 691 S.W.2d 271 (Mo. Banc 1985); *Johnston v. Gaston County*, 329 S.E.2d 392 (1985); *Zizka v. Water Pollution Control Authority*, 490 A.2d 509 (Conn. 1985) and *Raschke v. Blancher*, 491 N.E.2d 1171, 141 Ill. App. 3d 813 (1986).[8]

Numerous other state courts have held that § 1983 actions involving state tax matters may be brought in state court like any other § 1983 action.[9] *See, e.g.*,

---

by implication opened its courts to § 1983 actions and there are no state court systems that refuse to hear § 1983 cases.")

[7] The court, however, neither cited nor attempted to distinguish the state court decisions which have ruled contrary to its conclusion.

[8] *See also Backus v. Chilivis*, 236 Ga. 500, 224 S.E.2d 370 (1976); *Spencer v. South Carolina Tax Comm'n*, 281 S.C. 492, 316 S.E.2d 386 (1984), *affirmed by an equally divided Court*, 471 U.S. 82 (1985).

[9] *See also Kollasch v. Adamany*, 99 Wis. 2d 533, 299 N.W.2d 891 (Ct. App. 1980), *rev'd on other grounds*, 104 Wis. 2d 552, 313 N.W.2d 47 (1981); *Eclectic v. Mays*, 547 So. 2d 96 (Ala. 1989); *Satellink of Chicago, Inc. v. Chicago*, 168 Ill. App. 3d 689, 523 N.E.2d 13 (1988); *Department of Treasury v. Campbell*, 161 Mich. App. 526, 411 N.W.2d 722 (1986); *423 South Salina Street, Inc. v. Syracuse*, 68 N.Y.2d 474, 503 N.E.2d 63, 510 N.Y.S.2d 507 (1986), *cert. denied*, 481 U.S. 1008 (1987); *Holden Arboretum v. Kirtland*, 19 Ohio App. 3d 125, 483 N.E.2d 167 (1984); *Brower v. Wells*, 103 Wash. 2d 96, 690 P.2d 1144 (1984) (en banc).

American Trucking Ass'ns v. Secretary of State, —— A.2d ——, 1991 Me. LEXIS 148 (Me. 1991); *Burrell v. Mississippi State Tax Comm'n*, 536 So. 2d 848, 864 (Miss. 1988); *Marx v. Truck Renting & Leasing Ass'n*, 520 So. 2d 1333 (Miss. 1987); *Allison v. Board of County Comm'rs*, 241 Kan. 266, 737 P.2d 6 (1987); *Arkansas Writers' Project, Inc. v. Ragland*, 738 S.W.2d 402, 403 (Ark. 1987); *Beverly Bank v. Board of Review*, 117 Ill. App. 3d 656, 453 N.E.2d 96 (1983), *cert. denied*, 466 U.S. 951 (1984); *Bung's Bar & Grille, Inc. v. Township Council of Florence*, 206 N.J. Super. 432, 502 A.2d 1198 (1985); *Porter v. Treasurer & Collector of Taxes*, 385 Mass. 335, 431 N.E.2d 934 (1982). In addition, at least four federal circuits have declined jurisdiction in state tax matters based in part upon the availability of a state-court § 1983 action.[10] In addition, two recent cases in this Court demonstrate the amenability of state courts to entertaining § 1983 causes of action involving state tax matters. *See Dennis v. Higgins*, —— U.S. ——, 111 S. Ct. 865 (1991); *National Private Truck Council, Inc. v. Oklahoma Tax Commission*, —— U.S. ——, 111 S. Ct. 2882 (1991).

The sharp divergence of state courts on this issue is further illustrated by the conflicting decisions in *Davis*-related litigation. Thousands of federal retirees seeking to enforce their rights under 4 U.S.C. § 111 have been

---

[10] *See Burris v. Little Rock*, —— F.2d ——, 1991 U.S. App. LEXIS 18777 (8th Cir. 1991) (§ 1983 suits may be brought in the Arkansas courts); *Long Island Lighting Co. v. Brookhaven*, 889 F.2d 428, 432 (2d Cir. 1989) ("the availability of a state-court § 1983 action strongly supports the withholding of federal jurisdiction"); *Brooks v. Nance*, 801 F.2d 1237, 1240 (10th Cir. 1986) ("[S]ection 1983 claims may be brought in the [Oklahoma] state court system."); *Miller v. Los Angeles*, 755 F.2d 1390, 1391 (9th Cir.), *cert. denied*, 474 U.S. 995 (1985) ("California's state courts allow actions to vindicate federal rights under section 1983."); *Comenout v. State of Washington*, 722 F.2d 574, 578 (9th Cir. 1983) ("section 1983 claims may be brought in Washington state courts").

denied the right to a judicial determination in the first instance, not only in this case, but also by the decision of the Oregon Supreme Court in *Nutbrown*, *supra*.[11] In contrast, federal retirees in Arkansas have obtained declaratory and injunctive relief under § 1983 and have established their right to seek fees under 42 U.S.C. § 1988. *See Pledger v. Bosnick*, 306 Ark. 45, —— S.W.2d —— (Ark. 1991).

II. THE DECISION OF THE WISCONSIN SUPREME COURT IS CONTRARY TO SEVERAL DECISIONS OF THIS COURT

A. Congress Has Preempted State Law Exhaustion Requirements in Actions Brought Pursuant to Section 1983.

The ruling of the Wisconsin Supreme Court and other courts that states may condition or limit a cause of action created by Congress is in direct conflict with numerous decisions of this Court. The decision has far-reaching consequences since it holds that States are free to nullify for their own people the legislative decisions that Congress made on behalf of all the People.[12] The decision violates the principle that a state cannot immunize an official from liability for injuries compensable under federal law. *Martinez v. California*, 444 U.S. 277 (1980); *Howlett v. Rose*, —— U.S. ——, 110 S. Ct. 2430 (1990). In addition, the court's decision qualifies the availability of the Congressional remedy in the first instance by holding that petitioners must "exhaust available state administrative remedies before commencing a sec. 1983 ac-

---

[11] In addition, the Attorney General of Arizona has noticed this issue in a cross-appeal in the *Davis* related case of *Bohn v. Waddell*, 164 Ariz. 74, 790 P.2d 772 (Ariz. Tax Ct. 1990), *appeal docketed*, No. 1 CA-TX 90-029 (1991).

[12] "The Wisconsin statutes reflect the legislature's intent that persons who wish to contest the administration of the Wisconsin tax statutes must first pursue relief through available administrative remedies." App. A at 18a.

tion in the courts of this state." [13] App. A at 21a. Such a rule is plainly inconsistent with § 1983 and numerous decisions of this Court construing the § 1983 remedy.

As this Court has recognized, § 1983 "provide[s] a remedy, to be broadly construed, against *all* forms of official violation of federally protected rights." *Dennis v. Higgins*, 111 S. Ct. 865, 869 (1991) (quoting *Monell v. New York City Dept., of Social Services*, 436 U.S. 658, 700-71 (1978) (emphasis added)). Section 1983 overrides any state law which conflicts with the remedies available under it and provides a federal remedy where the state remedy, though adequate in theory, is not available in practice. *Monroe v. Pape*, 365 U.S. 167, 173-74 (1961). Moreover, "it is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Id.* at 183.[14]

The decisions of this Court have repeatedly emphasized that " 'the central objective of the . . . civil rights statutes . . . is to ensure that individuals whose federal

---

[13] Indeed, the decision further suggests that this exhaustion requirement may also include a state judicial exhaustion requirement before the petitioners may invoke § 1983. App. A at 17a. ("If the alleged violations of their federal rights are not rectified through resort to the Wisconsin agencies *and judicial review*, then [petitioners] will be able to assert their sec. 1983 action in state or federal court." (emphasis added). App. A, at 17a.

[14] As this Court has explained:

> These causes of action exist independent of any other legal or administrative relief that may be available as a matter of federal or state law. *They are judicially enforceable in the first instance.* The statutes are characterized by broadly inclusive language. *They do not limit who may bring suit, do not limit the cause of action to a circumscribed set of facts, nor do they preclude money dmaages or injunctive relief.*

Burnett v. Grattan, 468 U.S. 42, 50 (1984) (emphasis added). *See Felder v. Casey*, 487 U.S. 131, 148 (1988).

constitutional or statutory rights are abridged may recover damages or secure injunctive relief.' . . . Thus § 1983 provides 'a *uniquely* federal remedy against incursions . . . upon rights secured by the Constitution and laws of the Nation,' . . . and is to be accorded 'a sweep as broad as its language.'" *Felder v. Casey*, 487 U.S. 131, 139 (1988) (citations omitted) (emphasis added).

The decision below conditions, if not bars, the petitioners from asserting their federal rights unless a state remedy is first invoked.[15] However, "states . . . may no more condition the federal right to recover for violations of civil rights than bar that right altogether . . . ." *Felder*, 487 U.S. at 144.[16] Contrary to the decision below,

---

[15] Such a rule ignores the dominant characteristics of civil rights actions which has consistently been recognized by this Court's decisions. "[T]hey belong in court." *Burnett* 468 U.S. at 50.

[16] *Felder*, 487 U.S. at 148, prohibits less burdensome exhaustion requirements than those imposed here. The remedy to which the petitioners have been relegated by the court below requires that they submit their claims to the defendant as a condition of recovery. Wis. Stat. § 71.75. The administrative remedy involves a burdensome three stage process with short statutes of limitations at each stage. For example, a notice of assessment must be contested within 60 days or it becomes final. Wis. Stat. § 71.88. Upon denial of the appeal, a petitioner must file a petition and pay a filing fee with the Tax Appeals Commission within 60 days of any denial of appeal. Failure to timely file results in the determination becoming final. Wis. Stats. §§ 71.88(a) and 73.01(5). App. E. at 48a. In addition, it is the defendant's position that the Tax Appeals Commission can only hear those issues which have clearly been raised before the Department. In turn, it is the defendants' position that only those issues which have been clearly raised before the Commission may be reviewed in subsequent judicial review proceedings. *See, e.g., Omernick v. Department of Natural Resources*, 100 Wis. 2d 234, 249, 301 N.W.2d 437, *cert. denied*, 454 U.S. 883 (1981) (Failure to raise an issue before an agency precludes its consideration by circuit court on review). However, neither the Department of Revenue nor the Tax Appeals Commission have jurisdiction to entertain § 1983 claims. *See* Section *C*, *infra*.

Congress has not assigned to either the Wisconsin Supreme Court or legislature "a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." *Wilson v. Garcia*, 471 U.S. 261, 269 (1985). Yet, its decision rests solely on considerations of local policy. App. A at 18a. As this Court has recently observed:

> 'The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible because it presupposes what in legal contemplation does not exist.'

Howlett v. Rose, —— U.S. ——, 110 S. Ct. 2430, 2440 (1990) (quoting *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 57 (1912)).

The effect of the decision below is to bestow a form of absolute immunity upon state officials in the guise of jurisdiction.[17] However, this Court has recently rejected the argument that the Wisconsin legislature, by enacting administrative exhaustion statutes, can deprive a state court of jurisdiction:

> The force of the Supremacy Clause is not so weak that it can be evaded by mere mention of the word "jurisdiction." Indeed, if this argument had merit, the State of Wisconsin could overrule our decision in *Felder v. Casey*, 487 U.S. 131, 108 S. Ct. 2302, 101

---

[17] The exhaustion requirement imposed in this case is particularly perilous since the time within which it is completed is subject to the control of the defendants. The defendants can take up to a year to deny a refund claim. Wis. Stats. § 71.75(7). The defendants can then take another six months to act at the second stage. Wis. Stats. § 71.88. Thereafter, a petitioner is subject to the docket burden of the Tax Appeals Commission. Thus, it is posible for the defendants to manipulate the completion of the exhaustion process in order to assert that a subsequent § 1983 action is time barred. *See Board of Regents v. Tomanio*, 446 U.S. 478 (1980); *Patsy v. Board of Regents*, 457 U.S. 496, 514 n.17 (1982).

> L. Ed. 2d 123 (1988), by simply amending its notice of claims statute to provide that no state court would have jurisdiction of an action in which the plaintiff failed to give the required notice. The Supremacy Clause requires more than that.

Howlett v. Rose, —— U.S. ——, 110 S. Ct. 2430, 2446 (1990).[18]

B. The Tax Injunction Act and Federal Principles of Comity Are Inapplicable to § 1983 Claims Brought in State Court.

Equally unavailing is the Wisconsin Supreme Court's suggestion that the result in this case is supported by the Tax Injunction Act and this Court's decision in *Fair Assessments in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981).[19] As Justice Scalia recently observed, "'jurisdiction is not defeated by implication.'" *Tafflin v. Levitt*, —— U.S. ——, 110 S. Ct. 792, 801 (1990) (Scalia, J., concurring) (citations omitted). "It . . . takes an affirmative act of power under the Supremacy Clause to oust the States of jurisdiction. . . ." *Id.* The language of the Tax Injunction Act plainly declares the legislative purpose.[20] By its express terms, the Act applies

---

[18] It is indisputable that the trial court in this case had general jurisdiction of the class of actions to which this case belongs. Wisconsin courts have consistently held that state courts have jurisdiction to hear and decide section 1983 claims. *See Enright v. Board of School Directors*, 118 Wis. 2d 236, 244, 346 N.W.2d 771, *cert. denied*, 469 U.S. 966 (1984); *Riedy v. Sperry*, 83 Wis. 2d 158, 160, 265 N.W.2d 475 (1978); *Weyenberg Shoe Mfg. Co. v. Seidl*, 140 Wis. 2d 373, 386, 410 N.W.2d 604 (Ct. App. 1987).

[19] 28 U.S.C. § 1341 provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

[20] As this Court has explained, "'[i]n the absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute itself 'must ordinarily be regarded as conclusive.'" *Burlington N. R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) (citations omitted).

only to the federal courts and has no application to a state court.[21]

The result reached by the Wisconsin Supreme Court depends upon the adoption of words to both the statutory provisions of § 1983 and 28 U.S.C. § 1341 which are complete as they stand. Adoption of the court's view below "would require amendment rather than construction of the statute[s], and it must be rejected here." *Burlington N. R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 463 (1987). Only Congress has the authority to place exhaustion requirements on § 1983 actions brought in state court. Congress has never even intimated that an exhaustion requirement should be imposed upon a § 1983 claimant who challenges a state taxing scheme in a state court. The Wisconsin Supreme Court has impermissibly invaded Congress' legislative province by judicially extending federal court jurisdictional limitations onto state court § 1983 actions. "It is for Congress to determine whether § 1983 litigation has become too burdensome to state or federal institutions and, if so, what remedial action is appropriate." *Tower v. Glover*, 467 U.S. 914, 923 (1984). "[T]he states are [not] free to redefine the federal cause of action." *Howlett*, 110 S. Ct., at 2446.

The court below also reasoned that its recognition of a principle of state court comity toward a state agency was supported by this Court's decision in *Fair Assess-*

---

[21] The legislative history of the Tax Injunction Act clearly establishes that Congress only intended to limit federal court jurisdiction over state tax challenges. Indeed, one of the principal reasons Congres passed the Act was to establish state courts as the primary forum for lawsuits challenging state taxes. *See* 81 Cong. Rec. 1417 (1937); S. Rep. No. 1035, 75th Cong., 1st Sess. 2 (1937); H.R. Rep. No. 1503, 75th Congress, 1st Sess. 2 (1937). The legislative reports to the Act emphasize that if a *state court* is unable to protect a plaintiff's rights, the plaintiff may pursue his claim in federal court. *Id.*

ment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981). However, *McNary* held that the principle of comity only prevents a § 1983 action "against the validity of state tax systems in *federal court*." *McNary*, 454 U.S. at 116 (emphasis added). *McNary* merely precludes actions seeking damages under § 1983 from being brought in *federal* court where the state remedy is considered to be adequate.[22]

Nowhere in the *McNary* decision is it stated or implied that a taxpayer who brings a § 1983 claim in state court is to be treated differently than other § 1983 plaintiffs. *McNary*'s holding was expressly limited to § 1983 actions brought in federal court. *Id.* at 116. In fact, the Court stated that taxpayers seeking to vindicate rights under § 1983 "must seek protection of their federal rights by *state* remedies . . . ." *Id.* (emphasis added). In addressing the remedies available in Missouri to the § 1983 plaintiffs, the Court stated that "the Missouri Supreme Court has expressly held that plaintiffs such as petitioners may assert a § 1983 claim in state court." *Id.* Moreover, subsequent to *McNary*, the Court in *Pennhurst State Schools & Hosp. v. Halderman*, 465 U.S. 89 (1984), stated: "[c]hallenges to the validity of state tax systems under 42 U.S.C. § 1983 . . . *must be brought in state court*." *Id.* at 122 (emphasis added).[23]

---

[22] In *McNary*, the adequacy of the available Missouri remedies was not in issue. *Id.* at 116.

[23] In the wake of *McNary*, numerous state courts have held that § 1983 actions involving the state taxes may be brought directly in state court. *See, e.g., Burell v. Mississippi State Tax Comm'n*, 536 So. 2d 848 (Miss. 1988) (expressly overruling, based on *McNary*, a Mississippi Supreme Court Case, *State Tax Comm'n v. Fondren*, 387 So. 2d 712, 723 (Miss. 1980), which held that a section 1983 action seeking to enjoin the State from collecting an unconstitutional tax could not be brought in state court); *Allison v. Board of County Comm'rs*, 241 Kan. 26, 737 P.2d 6 (1987) (holding, pursuant to *McNary*, that section 1983 claim challenging a state's unequal assessment must be brought in state court); *Arkansas Writters' Project, Inc. v. Ragland*, 738 S.W.2d 402, 403 (Ark. 1987).

In *McNary*, this Court did not decide the issue of whether comity would bar federal court jurisdiction of a § 1983 claim which requires no scrutiny of state tax assessment practices. The Court stated:

> We need not decide in this case whether the comity spoken of would also bar a claim under § 1983 which requires no scrutiny whatever of state tax assessment practices, such as a facial attack on tax laws colorably claimed to be discriminatory as to race.

McNary, 454 U.S. at 107 n.4. Yet, the Wisconsin Supreme Court held that *McNary* stands as authority to bar this state court § 1983 claim which requires no scrutiny of state tax assessment practices. "The elements of, and the defenses to, a federal cause of action are defined by federal law." *Howlett v. Rose*, —— U.S. ——, 110 S. Ct. 2430, 2442 (1990). Wisconsin is not "free to redefine the federal cause of action." *Id.* at 2446.

In this case, not only is there a facial attack on the taxing scheme, but there is also a final, unappealed judicial determination that the discriminatory scheme violates 4 U.S.C. § 111. App. C at 40a. In addition, the federal constitutional defense raised by the defendants in this case does not turn on questions of state law. The issue of continued enforcement of the scheme turns exclusively on an "unambiguous" 1939 enactment of Congress, which was construed by this Court in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989). The defendants have fully considered the issue and have asserted that the rule in *Davis* is "not applicable retroactively." TR. 5. They have also fully articulated their asserted reason why *Davis* does not apply retroactively—*Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). TR. 5. That position remains unchanged despite the fact that the issue resolved in *Davis* was whether Mr. Davis' federal pension was legally taxable under the Michigan In-

come Tax Law for years 1979 through 1984. *Davis*, 489 U.S. at 806-07, 817.[24]

Even if the rule of comity governing litigation in federal courts could otherwise be extended to a state court, it has no application here. The "rule seeks to avoid withholding tax funds from local authorities until the tax is determined to be unlawful, *not afterwards.*" *McNary*, 454 U.S. at 123 n.8 (Brennan, J., concurring). Here there is no effort to escape payment of other income taxes. Petitioners seek relief from the continuing enforcement of only those taxes which have already been determined to be unlawful. Therefore, no part of the tax will have been "lost to the States without a judicial examination into the real merits of the controversy." S. Rep. No. 1035, 75th Cong., 1st Sess. 1-2 (1937). The conclusion of the Court below that federal notions of comity justify exhaustion in this state court § 1983 case is without merit. The exactions and continuing wrongs sought to be enjoined are merely in the "guise of a tax" and are unenforceable even if federal comity principles are applied. *See Miller v. Standard Nut Margarine Co.*, 284 U.S. 498 (1932); *American Trucking Ass'n v. Gray*, 483 U.S. 1306 (1987).

C. The Decisions of This Court Excuse the Exhaustion of Inadequate or Futile Administrative Remedies.

Even if an exhaustion requirement could otherwise be imposed, exhaustion of administrative remedies is not

---

[24] Petitioners represent that the defendants' position remains unchanged even after the judgment of this Court in *James B. Beam Distilling Co. v. Georgia*, —— U.S. ——, 111 S. Ct. 2439, 2445-46 (1991) ("Because the Court in *Bacchus* remanded the case solely for consideration of the pass-through defense, it thus should be read as having retroactively applied the rule there decided. . . . *Cf. Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 817.") (footnote and citations omitted).

warranted in this case.[25] A party need not exhaust administrative remedies that are inadequate or where exhaustion would be futile. *See, e.g., Coit Independence Joint Venture v. Federal Savings & Loan Ins. Corp.*, 489 U.S. 561, 587 (1989); *Honig v. Doe*, 484 U.S. 305, 326-27 (1988); *Bowen v. New York*, 476 U.S. 467, 485 (1986); *City Bank Farmers' Trust Co. v. Schnader*, 291 U.S. 24, 27 (1934); *Montana Nat'l Bank v. Yellowstone County of Montana*, 276 U.S. 499, 505 (1928).

In this case, "the recovery of damages under the Civil Rights Act first requires a 'declaration' or determination of the unconstitutionality of a statutory scheme. . . ." *McNary*, 454 U.S., at 115. "[J]udicial power is vested only in courts," *Milwaukee v. Wroten*, 160 Wis. 2d 207, 219 n.8, 466 N.W.2d 861 (1991).[26] Administrative agencies are not clothed with the power to declare laws unconstitutional. *See Kmiec v. Spider Lake*, 60 Wis. 2d 640, 646, 211 N.W.2d 471 (1973). The agencies which the court held that petitioners are required to resort are without power to grant the relief sought.[27]

---

[25] The "basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." *Parisi v. Davidson*, 405 U.S. 34, 37 (1972). None of these objectives would be served by petitioners' resort to administrative remedies in this case.

[26] The "determination of constitutionality reasonably cannot abide initial adjudication by the appellate court at a time long subsequent to the onerous imposition of the strictures of an unconstitutional legislative act. . . . [W]henever a constitutional question is raised, it should be decided." *Milwaukee*, 160 Wis. 2d at 217.

[27] "The legislature cannot confer upon tribunals, other than courts, powers which are strictly and consistently judicial." *Wendlandt v. Industrial Comm'n*, 256 Wis. 62, 67, 39 N.W.2d 854 (1949). "The power to determine the constitutionality of a legislative enactment is strictly a judicial duty." *Id.*, 246 Wis. at 67. *See also Tooley v. O'Connell*, 77 Wis. 2d 422, 440-41, 253 N.W.2d 335 (1977)

There also is no statutory authority which confers subject matter jurisdiction upon the Department of Revenue to entertain a civil rights action brought pursuant to § 1983. The Petitioners seek damages against the defendants in their *individual* capacities. TR. 2. Chapters 71 and 73 of the Wisconsin Statutes do not confer jurisdiction upon the Department of Revenue to enter judgment against the defendants and hold each *individually* liable.[28] Thus, it is simply inconceivable how the petitioners could exhaust their § 1983 claims before an agency that lacks jurisdiction to hear them.[29]

The administrative remedy which the court below ruled that the Petitioners must exhaust is a *burdensome*, but empty ritual. The resolution of the issue of whether the defendants can prospectively apply 4 U.S.C. § 111 only to pensions received in years 1989 and after does "not

---

(same). In *Nelson Bros. Furniture Corp. v. W.D.O.R.*, Docket No. 1-8697 (1987), the Commission itself acknowledged the long-standing bar against it declaring a statute unconstitutional stating "we lack the jurisdiction to declare Wisconsin Statutes unconstitutional." *Id. See also* 3 Davis *Administrative Law Treatise*, § 20.04 at 74 (1958) ("[W]e do not commit to adminisrative agencies the power to determine the constitutionality of legislation. Only the courts have authority to take action which runs counter to the expressed will of the legislative body.").

[28] An agency or board created by the legislature has only those powers which are conferred upon it by statute. *Silver Lake v. Wisconsin Dept. of Revenue*, 87 Wis. 2d 463, 468, 275 N.W.2d 119 (1978). Statutes conferring powers are strictly construed to preclude the exercise of a power which is not expressly granted. *Id.* Any doubt of the existence of an implied power of an administrative agency should be resolved against the exercise of such authority. *State ex rel. Farrell v. Schubert*, 52 Wis. 2d 351, 358, 190 N.W.2d 529 (1971), *vacated on other grounds*, 408 U.S. 915 (1972). Moreover, a court cannot order an administrative agency to do an act not authorized by statute. *Silver Lake*, 87 Wis. 2d at 470.

[29] *See, e.g., Omernick v. Department of Natural Resources*, 100 Wis. 2d 234, 249, 301 N.W.2d 437, *cert. denied*, 454 U.S. 883 (1981). (Failure to raise an issue before an agency precludes its consideration by circuit court on review).

require any particular expertise on the part" of the Wisconsin administrative agencies. *See McKart v. United States*, 395 U.S. 185, 198 (1969). The defense asserted by the defendants raises solely a federal question. This "antecedent choice-of-law question is a federal one where the rule at issue itself derives from federal law, constitutional or otherwise." *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2443 (1991). "[J]udicial review would not be significantly aided by an additional administrative decision." *McKart*, 395 U.S., at 199. The issue has already been resolved by this Court in *Davis*.

In addition, the petitioners have been repeatedly advised that their "claim[s] of nontaxability . . . [are] denied." *See City Bank Farmers' Trust Co. v. Schnader*, 291 U.S. 24, 27 (1934). TR. 5. As the Court observed in *Schnader*:

> [T]he Secretary of Revenue has refused to issue a waiver of tax, and . . . the Attorney General has notified the appellant and the State's appraiser the property is subject to tax, and the appellant's claim for exemption will be denied. The Commonwealth's law officers plainly intend to perform what they consider their duty, and will, unless restrained, cause the assessment and imposition of tax. The action the legality of which is challenged thus appears sufficiently imminent and certain to justify the intervention of a court of equity.

Id. at 34. Any resort to the agency would have been "utterly futile." *Montana Nat'l Bank v. Yellowstone County of Montana*, 276 U.S. 499, 505 (1928). Thus, exhaustion is excused.[30]

---

[30] The court below also erred when it suggested that petitioners' § 1983 claims "do not mature until the state officials have the opportunity to rectify their alleged violation through the usual administrative channels." App. A. 13a. These officials have had the chance to correct the violations and have refused to do so. The gravamen of the petitioners' action, *inter alia*, is that the defendants have implemented an unlawful scheme to mislead the members of the

D. The Wisconsin Supreme Court's Decision Requiring Exhaustion Conflicts With This Court's Decisions Under the Due Process Clause.

The Due Process Clause of the Fourteenth Amendment requires that a judicial tribunal be impartial. In *Withrow v. Larkin*, 421 U.S. 35 (1975), the United States Supreme Court stated that "a biased decisionmaker [is] constitutionally unacceptable." *Withrow*, 421 U.S. at 47. "This applies to administrative agencies which adjudicate as well as to the courts." *Id.* at 46, *citing Gibson v. Berryhill*, 411 U.S. 564, 579 (1973). The Court stated further that "various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow*, 421 U.S. at 47. The Court noted that among these cases are those in which the "adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal . . . criticism from the party before him." *Id.*

In the instant action, defendants Bugher and Musolf have each been sued in their individual capacities.[31] There-

---

petitioners' class for the purpose of extinguishing as many claims as possible. In certifying the class, the trial court found that judicial intervention was necessary to protect the important constitutional interests involved. App. C at 41a. As this Court has observed:

> We should be especially sensitive to this kind of harm where the Government seeks to require claimants to exhaust administrative remedies merely to enable them to receive the procedure they should have been afforded in the first place.

Bowen v. New York, 476 U.S. 467, 484 (1986).

[31] Defendant Bugher is the current secretary of the Department of Revenue. He controls and directs the first two stages of the administrative remedy within the Department of Revenue. Defendant Musolf is a former secretary of Revenue. At the time the defense of this case was formulated, he served as Deputy Attorney General of the State of Wisconsin. In June, 1991, Defendant Musolf was appointed Chairman of the Wisconsin Tax Appeals Com-

fore, defendants Bugher and Musolf have a direct pecuniary interest in this lawsuit. Moreover, this litigation has been aggressively pursued by the petitioners and vigorously defended by the defendants. Under these facts, the petitioners cannot possibly receive an unbiased adjudication of their rights.

E. The Wisconsin Supreme Court's Decision is in Conflict with the Court's Decision in *Ex parte Young*.

With respect to Petitioners' claims for injunctive relief, the defendants have made clear that they will continue to assess, enforce and penalize those who fail to comply with this unlawful scheme.[32] TR. 13. In the process, they put these elderly citizens at risk that their constitutional rights will be extinguished. The exhaustion requirement ordered by the Court clothes the defendants with a form of immunity from suit. However, as the decisions of this Court establish, the court below had no power to impart such immunity.

In *Ex parte Young*, 209 U.S. 123 (1908), the Court rejected the defense of sovereign immunity and issued an injunction, stating:

> If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. *The State has no power to impart*

---

mission. Thus, each level of the administrative remedy to which the petitioners have been relegated by the decision below is controlled by defendants in this case.

[32] *Cf. Hennick v. Wisconsin Dept. of Revenue*, No. 88-I-433 (Wisc. Tax App. Comm. Oct. 12, 1989) CCH Wisconsin Tax Reporter (1986 to 1990 Transfer Binder) ¶ 203-095. (1989 Wisc. Tax Lexis 36) (taxpayer subject to 25% incorrect return penalty for raising "good faith" constitutional claim by not paying the tax).

> *to him any immunity from responsibility to the supreme authority of the United States.*

Id. at 159-60 (emphasis added).[33]

In *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989), this Court reaffirmed petitioners' entitlement to pursue their § 1983 claim for injunctive relief:

> Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'

Id. at 71 n.10.[34]

The Wisconsin Supreme Court was powerless to change rights established by Congress. As this Court has repeatedly ruled:

> The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are.

Claflin v. Houseman, 93 U.S. 130, 136 (1876).

---

[33] *See Osborn v. Bank of the United States*, 22 U.S. 738, 859 (1824) ("If the law of the State of Ohio be repugnant to the consituation, or to a law of the United States made in pursuance thereof . . . [it can] furnish no authority to those who took, or those who received, the [taxes] for which this suit was instituted."); *Georgia R. & Banking Co. v. Redwine*, 342 U.S. 299, 304-05 (1952) ("This Court has long held that a suit to restrain unconstitutional action threatened by an individual who is a state officer is not a suit against the state . . . . This general rule has been applied in suits against individuals threatening to enforce allegedly unconstitutional taxation . . .) (footnotes omitted).

[34] Indeed, even in the absence of a § 1983 complaint, Wisconsin courts have consistently applied the rule of *Ex parte Young*. *See John F. Jelke Co. v. Hill*, 208 Wis. 650, 661, 242 N.W. 576 (1932); *Wisconsin Fertilizer Ass'n v. Karns*, 39 Wis. 2d 95, 104-5, 158 N.W.2d 294 (1968); *Arthur v. State Conservation Comm'n*, 33 Wis. 2d. 585, 590-91, 148 N.W.2d 17 (1967); *Barry Laboratories, Inc. v. Wisconsin State Bd. of Pharmacy*, 26 Wis. 2d 505, 511, 132 N.W.2d 833 (1964).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari to the Supreme Court of Wisconsin should be granted.

Respectfully submitted,

EUGENE O. DUFFY*
GREGORY W. LYONS
MARK S. POKER
O'NEIL, CANNON & HOLLMAN, S.C.
111 East Wisconsin Avenue
Milwaukee, WI 53202-4803
(414) 276-5000
Attorneys for Petitioners

* Counsel of Record

September 5, 1991

APPENDICES

APPENDIX A

IN SUPREME COURT
STATE OF WISCONSIN

No. 89-1175

J. GERARD HOGAN, DELORES M. HOGAN, JEROME S. POKER, MARGARET H. POKER, on behalf of themselves and all residents of the State of Wisconsin who were paid retirement benefits by the United States government in any one or all of the years 1982, 1983, 1984, 1985, 1986, 1987 and 1988, similarly situated,

Plaintiffs-Respondents,

v.

MARK E. MUSOLF, individually and as former secretary of the State of Wisconsin Department of Revenue, MICHAEL LEY, individually and as former secretary of the State of Wisconsin Department of Revenue, KAREN A. CASE, individually and as former secretary of the State of Wisconsin Department of Revenue, MARK D. BUGHER, individually and as secretary of the State of Wisconsin Department of Revenue, and all their unknown agents, employees, successors in office, assistants and all others acting in concert or cooperation with the current and former secretaries of the State of Wisconsin Department of Revenue or at the direction of the current and former secretaries of the State of Wisconsin Department of Revenue,

Defendants-Appellants-Petitioners.

[Filed June 26, 1991]

REVIEW of a decision of the court of appeals affirming an order of the Circuit Court for Dane County, Judge P.C. Jones, *Reversed.*

WILLIAM A. BABLITCH, J. This case does not involve the question of whether these retirees are entitled to a tax refund. Nor does it involve the question of the amount of such refund. It involves only the question of what route these retirees must take in pursuing their claim for refund. The primary issue presented is whether these retirees must exhaust their state administrative remedies before filing a sec. 1983 action in state courts. The defendants, the present and three former secretaries of the Department of Revenue (collectively the Department), seek review of a court of appeals' decision which allowed these retirees to seek their sec. 1983 relief in the state courts. The plaintiffs (retirees) brought this action in state court under 42 U.S.C. sec. 1983 alleging that the Department had violated, and was continuing to violate, their federal statutory and constitutional rights by exacting taxes that discriminate against retired federal employees. Our decision requires that we address four issues: 1) Are violations of sec. 111 regarding intergovernmental immunity claims actionable under 42 U.S.C. sec. 1983? We conclude they are. 2) Does federal law require state courts to entertain sec. 1983 actions in tax matters where the plaintiff has not exhausted established state administrative remedies? We conclude federal law does not so require if the state administrative remedies are plain, adequate, and complete. 3) Are Wisconsin's administrative remedies plain, adequate, and complete? We conclude they are. 4) Does Wisconsin law require these retirees to exhaust available state administrative remedies before commencing a sec. 1983 action in the Wisconsin courts? We conclude it does. Accordingly, we reverse the court of appeals' decision which affirmed the circuit court's order granting injunctive relief to the plaintiffs and denying the Department's motion to dismiss.

The retirees commenced this action on April 17, 1989. The named plaintiffs, J. Gerard Hogan, Dolores M. Hogan, Jerome S. Poker, and Margaret H. Poker, have been Wis-

consin residents from at least 1982 through the present. Mr. Poker and Mr. Hogan are former federal employees. Mr. Poker worked for the United States Postal Service for twenty-eight and one-half years, including three and one-half years of military service. Mr. Hogan worked for the Federal Bureau Of Investigation for thirty-two years, including four years concurrent service in the Naval Reserve. As a result of their federal employment, Poker and Hogan received federal retirement benefis that were taxed by the State of Wisconsin.

The plaintiffs commenced this sec. 1983 action in the wake of the United States Supreme Court's decision in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989). In *Davis*, the plaintiff asserted that he was due a state income tax on taxes paid on his federal retirement benefits because the Michigan tax system discriminated against federal retirees in violation of 4 U.S.C. sec. 111, which preserves federal employees' immunity from discriminatory state taxation.[1] The Michigan tax statutes exempted from taxation all retirement benefits paid by Michigan and its political subdivisions, while levying an income tax on federal retirement benefits. *Id.* at 805. The Court held that Davis was entitled to a refund of taxes paid because the Michigan tax scheme was contrary to sec. 111 and violated principles of intergovernmental tax immunity. *Id.* at 817.

The plaintiffs allege that the Wisconsin tax system has similarly discriminated against federal retirees. From 1963 until 1988, Wisconsin exempted the benefits of many retired employees of state and local government from in-

---

[1] 4 U.S.C. sec. 111 provides in relevant part:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

come taxation. *See* Sec. 71.05(1)(a), Stats. 1987-88,[2] sec. 71-03(2)(d), from 1965 to 1985; and sec. 71.03(2)(g) 1963. During this same period, federal retirement benefits were not exempt from income taxation. Based on this discrepancy, the plaintiffs allege that the defendants violated the supremacy clause, art. VI, cl. 2, of the United States Constitution, principles of intergovernmental tax immunity articulated by the Court in *Davis*, and 4 U.S.C. sec. 111.

The retirees sought declaratory and injunctive relief against the defendants in their individual capacities pursuant to 42 U.S.C. sec. 1983,[3] in circuit court for Dane County. They also sought damages under a pendent state law claim of money had and received.

The Department responded to the plaintiffs' complaint by filing a motion to dismiss, asserting numerous defenses including the defense that the retirees had not

---

[2] 71.05 Income computation. (1) EXEMPT AND EXCLUDABLE INCOME. There shall be exempt from taxation under this subchapter the following:

(a) . . . All payments received form the employe's retirement system of the City of Milwaukee, Milwaukee county employes' retirement system, sheriff's annuity and benefit fund of Milwaukee county, policy officer's annuity and benefit fund of Milwaukee, fire fighter's annuity and benefit fund of Milwaukee, or the public employe trust fund as successor to the Milwaukee public school teachers' annuity and retirement fund and to the Wisconsin state teachers retirement system, which are paid on the account of any person who was a member of the paying or predecessor system or fund as of December 31, 1963, or was retired from any of the systems or funds as of December 31, 1963, but such exemption shall not exclude from gross income tax sheltered annuity benefits.

[3] 42 U.S.C. sec. 1983 provides in relevant part: "Every person who, under color of any statute . . . of any state . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

exhausted their state administrative remedies. On May 19, 1989, the plaintiffs moved for a declaration that sec. 71.05(1)(a), Stats., is unconstitutional, for certification of the class of federal retirees, and for injunctive relief precluding the enforcement of sec. 71.05(1)(a) and establishing a constructive trust.

After determining it had personal jurisdiction over the Department and subject matter jurisdiction over this action, the circuit court enjoined the Department "from collecting, asserting, imposing or otherwise attempting to collect, assert, or impose any tax or liability upon or against any [Plaintiff] . . . from June 13, 1989 forward pending the resolution of this action on the merits," because the continuation of these activities would cause irreparable injury to the plaintiffs. In addition, the court ordered the Department to hold any money collected from the plaintiffs in a constructive trust. The court then certified the plaintiff class of federal retirees pursuant to sec. 803.03, Stats. The court did not hear or decide the issue of whether funds already collected by the department should be returned to the plaintiffs.

The court of appeals granted the Department's petition for leave to appeal the circuit court's order on August 1, 1989. On August 9, 1989, 1989 Wisconsin Act 31, section 1817m, went into effect exempting for 1989 and subsequent tax years the pension income of the federal retirees in the certified class. This provision of sec. 71.05, Stats., 1989-90 does not affect the liability of federal retirees for pre-1989 tax years.

The court of appeals affirmed the circuit court's order. In addition, the court held that the action had not been rendered moot by 1989 Wisconsin Act 31, section 1817m. We granted the Department's petition for review.

I.

As an initial matter, we agree with the plaintiffs that violations of sec. 111 are actionable under 42 U.S.C. sec.

1983. The Department contends that 4 U.S.C. sec. 111 creates no enforceable rights under sec. 1983 because intergovernmental immunity claims are not individual "rights, privileges or immunities" within the meaning of sec. 1983. The Department further argues that because 4 U.S.C. sec. 411 is grounded on considerations of power between the state and federal government, rather than on considerations of individual rights, there can be no cause of action under sec. 1983. *See Consol. Freightways Corp. of Del. v. Kassel*, 730 F. 2d 1139, 1146 (8th Cir. 1984); *Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1394 (9th Cir. 1987).

In *Golden State Transit Corp. v. City of Los Angeles*, 110 S. Ct. 444, 448 (1989), the Court established a two-step inquiry for determining whether sec. 1983 is available to remedy a statutory or constitutional violation. First, the plaintiff must assert the violation of a federal right. Second, even when the plaintiff has asserted a federal right, the defendant may show that Congress " 'specifically foreclosed a remedy under sec. 1983' by providing a 'comprehensive enforcement mechanis[m] for protection of a federal right.' " *Id.* (citation omitted). The Court has repeatedly held that the coverage of sec. 1983 must be broadly construed. *See, e.g., Dennis v. Higgins*, 111 S. Ct. 865, 868 (1991). Furthermore, the Court has emphasized that it has "rejected attempts to limit the types of constitutional rights that are encompassed within the phrase 'rights, privileges, or immunities.' " *Id.* at 870.

The first part of the test requires us to consider three factors: 1) Does sec. 111 create a binding obligation on the governmental unit, or is it merely a congressional preference?; (2) Is the interest vague and amorphous, or specific and definite, capable of judicial enforcement?; and (3) Is the statute intended to benefit the plaintiffs? *Golden State*, 110 S. Ct. at 448. *Davis* establishes that sec. 111 creates a binding obligation on the state that is

capable of judicial enforcement. The more difficult question is whether the statute was intended to benefit the plaintiffs.

In *Dennis*, the Court held that the imposition of illegal taxes contrary to the commerce clause by a Nebraska administrative agency gave rise to a sec. 1983 action. The Court determined that suits for violations of the commerce clause may be brought under sec. 1983 because the commerce clause, in addition to being a power-allocating provision, acts as a substantive restriction on permissible state regulation of interstate commerce. *Dennis*, 111 S. Ct. at 870, 872. Similarly, 4 U.S.C. sec. 111, as applied by the Court in *Davis*, imposes a substantive restriction on permissible state taxation of federal retirees in addition to allocating power between the state and federal government. *See Dennis*, 111 S. Ct. at 878-79 (Kennedy, J., dissenting) (suggesting that the Courts' rationale in *Dennis* creates a sec. 1983 cause of action when a state violates *Davis.*).

We conclude that the plaintiffs, by asserting a violation of sec. 111, have asserted a violation of a federal right. We also conclude that the Department has not shown that Congress specifically foreclosed a remedy by providing a comprehensive enforcement mechanism for protecting that right. Because sec. 111 protects federal retirees from discriminatory taxation, we are persuaded that violations of sec. 4 U.S.C. sec. 111 are actionable under sec. 1983.

II.

We must next consider whether federal law permits Wisconsin to require plaintiffs to exhaust state remedies in tax matters.

The plaintiffs argue that under the Court's decision in *Felder v. Casey*, 487 U.S. 131 (1988), a state cannot bar a plaintiff from bringing a sec. 1983 action because of the plaintiff's failure to resort to administrative procedures. The Department argues that the Court recog-

nized an exception to this principle in *Fair Assessment in Real Estate Assn. v. McNary*, 454 U.S. 100 (1981), for actions challenging the administration of state taxing statutes. We agree with the Department that, when a state's administration of its tax statutes is challenged, federal law permits the states to require plaintiffs to exhaust their administrative remedies before pursuing a sec. 1983 claim if those remedies are fair, adequate, and complete.

Felder concerned a Wisconsin notice-of-claim statute that required plaintiffs who brought suit against a state or local governmental entity or officer to give notice of the claim to the government defendant and to refrain from filing suit for 120 days after providing such notice. This court dismissed Felder's sec. 1983 action against the city of Milwaukee and certain police officers because he failed to comply with the notice-of-claim requirements in the Wisconsin statute. *Felder v. Casey*, 139 Wis. 2d 614, 408 N.W.2d 19 (1987). The Supreme Court reversed, holding that the notice-of-claim statute was preempted as inconsistent with federal law, based in part on its conclusion that the statute operated as an exhaustion requirement.

Felder established as a general rule that the states cannot impose an exhaustion requirement on plaintiffs who assert sec. 1983 claims in state courts. *Felder*, 487 U.S. at 146-150. *Cf. Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982) (holding that plaintiffs need not exhaust state administrative remedies before instituting sec. 1983 claims in federal courts.). The Court indicated that exhaustion requirements are disfavored because "the notion that a State could require civil rights victims to seek compensation from offending state officials before they could assert a federal action in state court" is "utterly inconsistent with the remedial purposes . . ." of sec. 1983. *Felder*, 487 U.S. at 149. Furthermore, the Court emphasized that sec. 1983 causes of action " 'exist

independent of any other legal or administrative relief that may be available as a matter of federal or state law. They are judicially enforceable *in the first instance*.'" *Id.* at 148 (quoting *Burnett v. Grattan*, 468 U.S. 42, 50 (1984)). The Court also stressed that policy considerations alone do not justify the imposition of an exhaustion requirement and that such requirements are only appropriate if exhaustion is consistent with congressional intent. *Id.* at 149.

In addition to determining that the notice-of-claim statute imposed an exhaustion requirement that was contrary to federal law, the Court found that notice requirements violate federal law in two other respects:

> First, . . . the application of the notice requirement burdens the exercise of the federal right by forcing civil rights victims who seek redress in state courts to comply with a requirement that is entirely absent from civil rights litigation in federal courts. . . Second, . . . the enforcement of such statutes in sec. 1983 actions brought in state court will frequently and predictably produce different outcomes in federal civil rights litigation based solely on whether that litigation takes place in state or federal court. *Felder*, 487 U.S. at 141.

Thus, the Court strongly expressed its view in *Felder* that any state procedural requirement, including an exhaustion requirement, that interferes with or is contrary to federal law, must yield to the federal interest. *Id.* at 151.

The Supreme Court, however, has also expressed its view that there are sound policy reasons for courts to refrain from interfering with traditional administrative procedures for addressing tax claims against the state. These policy reasons, which were recognized by the court in *McNary* and acknowledged by Congress in enacting

the Tax Injunction Act of 1937, 28 U.S.C. sec. 1341,[4] lead us to conclude that it is not contrary to federal law to impose an exhaustion requirement before entertaining sec. 1983 claims that challenge the administration of a state taxing scheme.

In *McNary*, the Court addressed the issue of whether a damages action could be brought in federal court under sec. 1983 to redress the allegedly unconstitutional administration of a state tax system. The Court recognized that the determination of this question required a choice between the established policy calling for federal-court restraint when deciding cases that affect state tax systems and the established policy of the court that sec. 1983 claims are actionable regardless of whether the plaintiff complied with state exhaustion requirements. *McNary*, 454 U.S. at 101-05. After examining these policies, the Court held that taxpayers are barred by the principle of comity from asserting sec. 1983 actions against the validity of state tax system in federal courts. *Id.* at 105.

The Court first acknowledged that it was well established that the federal courts were barred by the Tax Injunction Act and principles of comity from granting injunctive and declaratory relief in state tax cases. *Id.* at 107. The Court then examined the policies that support federal court restraint in tax matters to determine whether federal courts were also barred from granting damages relief in state tax cases:

> Such restraint [is] particularly appropriate because of the delicate balance between the federal authority and state governments, and the concomitant respect that should be accorded state tax laws in federal

---

[4] The Tax Injunction Act provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

court. As the Court in [*Mathews v. Rodgers*, 284 U.S. 521, 525 (1932)] explained:

> 'The reason for this guiding principle [of equitable restraint] is of peculiar force in cases where the suit, like the present one, is brought to enjoin the collection of a state tax in courts of a different, though paramount sovereignty. The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it.' *Id.* at 108.

In addition, both the majority opinion and the concurring opinion of Justice Brennan, joined by three other justices, relied upon Justice Brennan's discussion of the reasons for federal restraint in the area of state tax administration:

> 'The special reasons justifying the policy of federal noninterference with state tax collection are obvious. The procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules. State tax agencies are organized to discharge their responsibilities in accordance with the state procedures. If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer

> insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts.' *Id.* at 108-09 n.6; *Id.* at 137-38 n.27 (Brennan, J., concurring) (both quoting *Perez v. Ledesma*, 401 U.S. 82, 128, n.17 (1971) (Brennan, J., concurring in part and dissenting in part).

Based on the strong policy reasons for not interfering with a state's taxing scheme, the Court concluded in *McNary*, 454 U.S. at 116, that taxpayers should seek protection of their federal rights by state remedies, if those remedies are "plain, adequate, and complete," even when their claim is for damages.

The four justices who concurred in *McNary* disagreed with the majority that the jurisdiction of the court over an action for damages under sec. 1983 should be governed by principles of comity, but concluded that federal courts should refrain from hearing sec. 1983 actions pending exhaustion of state administrative procedures. *Id.* at 137 (Brennan, J., concurring). These justices found support for their position in congressional policy as reflected in the Tax Injunction Act, rather than in the judicial policy relied upon by the majority:

> Where the obligation to require exhaustion of administrative remedies may be fairly understood from congressional action, or is in accord with congressional policy, not only is sec. 1983 no bar, but the federal courts should be alert to further those policies. *Id.* at 136 (Brennan, J. concurring).

Although the majority opinion in *McNary* was motivated by federalism concerns, while the concurring opinion was motivated by a general recognition that state taxation is a uniquely sensitive local concern, both opinions in *McNary* reflect the view that state administrative tax procedures should not be undermined by sec. 1983 claims.

Both opinions also suggest that a sec. 1983 tax claim does not mature until the state officials have the opportunity to rectify their alleged violation through the usual administrative channels. *See McNary*, 454 U.S. at 114 (recognizing that if sec. 1983 claims were entertained in federal court "[t]axpayers . . . would be able to invoke federal judgments without first permitting the State to rectify any alleged impropriety."); *McNary*, 454 U.S. at 135, n. 24 (Brennan, J. concurring) (stating that "[i]t surely seems appropriate that before being held accountable in court those officials have the opportunity fully to consider petitioners' claims within the administrative forum that provides the only basis for their involvement in this matter.").

The Supreme Court's primary interest in *McNary* was to avoid interference with state taxing practices by permitting states to have the opportunity to apply their remedies and procedures in tax matters before federal remedies are sought by a sec. 1983 action. We understand *McNary* as indicating that the Court is equally concerned that tax challenges be conducted according to state remedies as it is that they be conducted in a state forum. It would be no less disruptive of the state's internal economy and administrative tax procedures for a state court to act under sec. 1983 and suspend the usual tax collection and refund procedures of the state than it would be for a federal court to do so. In addition, regardless of which court interferes with the state's fiscal operations, tax officials would be improperly denied the opportunity to rectify any alleged impropriety before being subject to a sec. 1983 action. Accordingly, we conclude that the policies which motivated the Court's decision in *McNary* are equally applicable to sec. 1983 actions in state court.

On the strength of these policies, we conclude that there is an exception in state tax matters to the general rule recognized in *Felder* prohibiting exhaustion requirements. Unlike the notice-of-claim provision in *Felder*, 487 U.S. at

149, the application of an exhaustion requirement in state tax matters is consistent with congressional intent. In *McNary*, 454 U.S. at 110, the Court indicated that non-interference with state taxing schemes was Congress' primary purpose in enacting the Tax Injunction Act. That purpose is defeated regardless of whether a state court or federal court entertains a sec. 1983 claim without requiring the plaintiffs to resort to the state's administrative procedures. As the Supreme Cort of Oregon recently stated in addressing this issue in *Nutbrown v. Munn*, No. 36652, Slip op. at 14 (May 9, 1991): "We see no basis for saying that exhaustion of administrative remedies will be *required*, as a matter of law, in federal courts, but may not even be *permitted*, as a matter of sovereign choice, in state courts." We also conclude that the Oregon court reached the proper conclusion when it stated:

> The four concurring justices in *McNary* and . . . the *Patsy* and *Felder* courts would [conclude that] requiring exhaustion is consistent with the congressional intent shown in the Tax Injunction Act. This does not mean that a *state* must, as a matter of federal law, impose a similar exhaustion requirement before it permits *its* courts to entertain such actions; neither Congress nor the federal courts has purported to control state trial procedure in such a way. What is does mean, we believe, is that a state *may* impose such a requirement *without offending* federal law. *Id.* at 15.

Furthermore, unlike in *Felder*, the enforcement of Wisconsin's exhaustion requirement will not produce a different outcome depending on whether the sec. 1983 litigation takes place in state or federal court.

We therefore conclude that federal law permits Wisconsin to require plaintiffs to exhaust state tax remedies if those remedies are plain, adequate, and complete.

III.

In order for a state's exhaustion requirement to be valid, the state remedies must be "plain, adequate, and complete." *McNary*, 454 U.S. at 116.[5] We have no trouble concluding that Wisconsin's administrative remedies meet this standard. The aggrieved taxpayer can challenge the tax by applying for a refund with the Department under sec. 71.75, Stats, and subch. XIV of ch. 71. The Department's decision is reviewable by the Tax Appeals Commission under sec. 73.01 and the Commission's decision is judicially reviewable pursuant to sec. 73.015. The circuit court's decision is, of course, subject to review by the appellate courts of this state. This orderly procedure respects the fiscal operations of the state and offers to the reviewing courts the benefit of the agency's findings and conclusions in an area in which agencies have special expertise. The federal courts that have considered this question have properly concluded in a similar context that Wisconsin's tax remedies are "plain, adequate, and complete." *Gray v. Morgan*, 371 F.2d 172 (7th Cir. 1966), *cer. denied*, 386 U.S. 1033 (1967); *O'Brien v. Dreyfus*, 493 F. Supp. 476, 479-80 (E.D. Wis. 1980); *Zenith Dredge Company v. Corning*, 231 F.Supp. 584 (1964).

We do not agree with the plaintiff's contention that the remedy is inadequate because they cannot obtain the same relief under the state remedies that are available under a sec. 1983 action. The inability of the plaintiffs to obtain the remedy they desire does not mean that they have been denied an adequate remedy. *Cf. Metzger* v. *Department of Taxation*, 35 Wis. 2d 119, 629, 150 N.W. 2d 431 (1967). A number of federal courts have held that state law remedies need not be in parity with sec. 1983 remedies in order to be sufficient. *See, e.g., Miller v.*

---

[5] The phrase "plain, adequate, and complete'" is essentially the equivalent of the phrase "'plain, speedy and efficient'" that is used in the Tax Injunction Act and other decisions of the Court. *McNary*, 454 U.S. at 116, n. 8.

Bauer, 517 F.2d 27, 32 (7th Cir. 1975); *Sipe v. Ameranda Hess Corp.*, 669 F.2d 396, 407 (3rd Cir. 1982). Finally, as discussed earlier, the plaintiffs' inability to obtain the equitable relief they seek has a sound basis in judicial and legislative policy.

The plaintiffs also contend that it would be futile to require them to exhaust their administrative remedies because the Department of Revenue and the Tax Appeals Commission are without authority to declare the tax statutes unconstitutional or to award damages against the defendants in their individual capacities. We need not decide whether the Department of Revenue or the Tax Appeals Commission has the authority to declare a statute unconstitutional in order to determine that it is not a futile exercise for the plaintiffs to initiate their claim with the agencies. Where the United States Supreme Court has held that another state's taxing scheme, which is substantially similar to Wisconsin's, violates federal law or the constitution, we conclude that the Department and the Commission have the authority to determine whether the continued application of the Wisconsin taxing scheme also violates federal law or the constitution. *See Sawejka v. Morgan*, 56 Wis. 2d 70, 80, 201 N.W.2d 528 (1972) (deciding that the tax appeals commission has the authority to make the initial decision with respect to the validity or constitutionality of applying a tax structure in a given situation). The agencies would become ineffectual if they lost their authority to review a case every time a constitutional claim was asserted. Furthermore, as a general matter, any constitutional claims may also be reserved for determination by the circuit court. The exhaustion of state remedies encompasses judicial review of the Commission's decisions. *See Ohio Civil Rights Comm'n v. Dayton Schools*, 477 U.S. 619, 629 (1986) ("[I]t is sufficient . . . that constitutional claims may be raised in state-court judicial review of the administrative proceeding."); *See also Middlesex County Ethics Committee v. Garden State Bar Assn.*, 457 U.S. 423, 435-36 (1982).

Finally, the Department and the Commission have the authority to grant a refund to these plaintiffs without deciding the constitutional issue on the ground that denying the federal retirees the same relief as state retirees violates 4 U.S.C. sec. 111.

We also conclude that the retirees' inability to obtain damages from the defendants in their individual capacities does not make the exhaustion requirement futile. The damages claimed against the defendants in their individual capacities are essentially a refund claim under a different name. The state's refund procedure adequately addresses these claims. Until that remedy is exhausted, "damages" are irrelevant. The defendants should, as *McNary*, 454 U.S. at 114, suggests, be permitted to "rectify any alleged impropriety" through the state's procedure.

We conclude that the state remedies available to the plaintiffs are plain, adequate, and complete and that it would not be futile to exhaust these remedies. By seeking administrative relief through the agencies and, if necessary, through judicial review of the administrative decision, the plaintiffs will have an opportunity to obtain relief for the alleged improper taxation and have the constitutionality of the state's taxing scheme determined. If the alleged violations of their federal rights are not rectified through resort to the Wisconsin agencies and judicial revew, then plaintiffs will be able to assert their sec. 1983 action in state or federal court.

IV.

We must now determine whether Wisconsin law requires that plaintiffs who challenge the administration of state taxing statutes must exhaust available state administrative remedies before commencing a sec. 1983 action in Wisconsin court.

We note that as a general rule, the courts of this state must entertain sec. 1983 claims. In *Terry v. Kolski*, 78 Wis. 2d 475, 496-97, 254 N.W.2d 704 (1977), this court

expressed its view regarding the responsibility of state courts to entertain sec. 1983 claims:

> It thus seems clear that courts of this state have jurisdiction to hear and decide sec. 1983 cases. In addition, they have an affirmative obligation under the Constitution of the United States to take jurisdiction whether or not the federal right asserted is pendent to a state claim. It is appropriate, in light of the interest of the state, as well as the interest of the United States, to take jurisdiction of these cases which are mandatory obligations under the Constitution and the statutes of the United States and the Constitution and laws of Wisconsin.

In tax matters, however, the Wisconsin statutes reflect the legislature's intent that persons who wish to contest the administration of the Wisconsin tax statutes must first pursue relief through available administrative remedies. Aggrieved taxpayers seeking refunds must make a claim with the department of revenue pursuant to the procedure of sec. 71.75, Stats. and subch. XIV of ch. 71.[6] If not satisfied with the Department's ultimate

---

[6] Section 71.75, Stats., provides in part:

> Claims for refund. (1) Except as provided in ss. 46.255, 71.77(5) and (7)(b) and 71.93, the provisions for refunds and credits provided in this section shall be the only method for the filing and review of claims for refund of income and surtaxes, and no person may bring any atcion or proceeding for the recovery of such taxes other than as provided in this section.
>
> (2) With respect to income taxes and franchise taxes, except as otherwise provided in subs. (5) and (9) and ss. 71.30(4) and 71.77(7)(b), refunds may be made if the claim therefor is filed within 4 years of the unextended date under this section on which the tax return was due.
>
> * * * *
>
> (6) Every claim for refund or credit of income or surtaxes shall be filed with the department of revenue . . . .

Subchapter XIV provides the procedure for petitioning the Department for redetermination of a denial of a refund.

determination, the taxpayer may then obtain a hearing from the Tax Appeals Commission under sec. 73.01(4), which provides in part:

> (4) POWERS AND DUTIES DEFINED. (a) Subject to the provisions for judicial review contained in s. 73.015, the commission shall be the final authority for the hearing and determination of all questions of law and fact arising under sub. (5) and . . . subch. XIV of ch. 71. . . .

The language of sec. 73.01(4) plainly reflects the legislature's intent that the Commission have exclusive initial jurisdiction for all questions of law and fact arising under subch. XIV of ch. 71. *See Jackson County Iron Co. v. Musolf*, 134 Wis. 2d 95, 106-07, 396 N.W.2d 323 (1986). The Commission's determination may be appealed to the circuit court pursuant to sec. 73.015, Stats., which provides that:

> (1) This section shall provide the sole and exclusive remedy for review of any decision or order of the tax appeals commission and no person may contest, in any action or proceeding, any matter reviewable by the commission unless such person has first availed himself or herself of a hearing before the commission . . . .
>
> (2) Any adverse determination of the tax appeals commission is subject to review in the manner provided in ch. 227. If the circuit court construes a statute adversely to the contention of the department of revenue, the department shall be deemed to acquiesce in the construction so adopted unless an appeal to the court of appeals is taken, and the construction so acquiesced in shall thereafter be followed by the department.

We recognized in *Metzger*, 35 Wis. 2d at 127, regarding the substantially similar language in the predecessors to these statutes, that a "more positive provision of ex-

clusive jurisdiction in the administrative procedure can scarcely be found in our statutes." In *Metzger*, we concluded that because of the plaintiffs' failure to exhaust their administrative remedies under sec. 73.015, the circuit court was without jurisdiction to entertain the plaintiffs' suit to enjoin the department of taxation from assessing gift taxes. *Id.* at 128-29. We recognized in *Metzger* the long standing policy that "certainty in tax collections is necessary for the continued function of government, and that this necessity is the policy foundation for the legislative limitations on the legal remedies available to taxpayers." *Id.* at 129. Although *Metzger* did not concern a sec. 1983 action, the decision reflects Wisconsin's policy that, in tax matters, " '[i]njunctive relief is not a substitute for the administrative procedure as clearly outlined and provided by legislative action.' " *Id.* at 125 (citation omitted). On the basis of the policy reasons discussed above and the legislature's expressed intent to have the Commission initially review contested tax matters, we conclude that plaintiffs who challenge the administration of the state's taxing statutes must exhaust their administrative remedies before commencing their sec. 1983 claims in the courts of this state.

We also note that our determination that plaintiffs challenging the administration of Wisconsin's taxing statutes must exhaust their state administrative remedies before commencing a sec. 1983 action is consistent with the view adopted by the majority of states that have addressed the question. In *Nutbrown*, 311 Ore. 328 (1991), the Oregon Supreme Court dismissed the plaintiffs' sec. 1983 action, which was based on an alleged violation of sec. 111, as in this case, because the plaintiff taxpayers failed to exhaust their administrative remedies. Numerous other state courts have also held that a sec. 1983 action may not be brought in state court to challenge the administration of state tax statutes when there is an adequate state remedy. *See, e.g., Linderkamp v. Bismarck School Dist. No. 1*, 397 N.W.2d 76 (N.D.

1986); *Stufflebaum v. Panethiere*, 691 S.W.2d 271 (Mo. banc 1985); *Johnston v. Gaston County*, 323 S.E.2d 381 (N.C. App. (1984), *rev. denied*, 329 S.E.2d 392 (1985); *Zizka v. Water Pollution Control Authority*, 490 A.2d 509 (Conn. 1985); *Raschke v. Blancher*, 491 N.E.2d 1171, 141 Ill. App. 3d 813 (1986).

For the reasons stated above, we conclude that plaintiffs who challenge the administration of Wisconsin's taxing statutes must exhaust available state administrative remedies before commencing a sec. 1983 action in the courts of this state. The plaintiffs have a plain, adequate, and complete remedy through these administrative remedies in which they may obtain relief for any violation of their federal rights. Therefore, we reverse the decision of the court of appeals and dismiss the plaintiffs' action.

By the Court:—The decision of the court of appeals is reversed.

IN SUPREME COURT
STATE OF WISCONSIN

No. 89-1175

J. GERARD HOGAN, DELORES M. HOGAN, JEROME S. POKER, MARGARET H. POKER, on behalf of themselves and all residents of the State of Wisconsin who were paid retirement benefits by the United States government in any one or all of the years 1982, 1983, 1984, 1985, 1986, 1987 and 1988, similarly situated,

Plaintiffs-Respondents,

v.

MARK E. MUSOLF, individually and as former secretary of the State of Wisconsin Department of Revenue, MICHAEL LEY, individually and as former secretary of the State of Wisconsin Department of Revenue, KAREN A. CASE, individually and as former secretary of the State of Wisconsin Department of Revenue, MARK D. BUGHER, individually and as secretary of the State of Wisconsin Department of Revenue, and all their unknown agents, employees, successors in office, assistants and all others acting in concert or cooperation with the current and former secretaries of the State of Wisconsin Department of Revenue or at the direction of the current and former secretaries of the State of Wisconsin Department of Revenue,

Defendants-Appellants-Petitioners.

SHIRLEY S. ABRAHAMSON, J. (concurring). I concur. I do not join Part III of the opinion.

APPENDIX B

IN COURT OF APPEALS
STATE OF WISCONSIN
DISTRICT IV

No. 89-1175

J. GERARD HOGAN, DELORES M. HOGAN, JEROME S. POKER, MARGARET H. POKER, on behalf of themselves and all residents of the State of Wisconsin who were paid retirement benefits by the United States government in any one or all of the years 1982, 1983, 1984, 1985, 1986, 1987 and 1988, similarly situated,

Plaintiffs-Respondents,

v.

MARK E. MUSOLF, individually and as former secretary of the State of Wisconsin Department of Revenue, MICHAEL LEY, individually and as former secretary of the State of Wisconsin Department of Revenue, KAREN A. CASE, individually and as former secretary of the State of Wisconsin Department of Revenue, MARK D. BUGHER, individually and as secretary of the State of Wisconsin Department of Revenue, and all their unknown agents, employees, successors in office, assistants and all others acting in concert or cooperation with the current and former secretaries of the State of Wisconsin Department of Revenue or at the direction of the current and former secretaries of the State of Wisconsin Department of Revenue,

Defendants-Appellants.

[Filed July 5, 1990]

APPEAL from an order of the circuit court for Dane county: P.C. JONES, Judge. *Affirmed and remanded.*

Before Eich, C.J., Gartzke, P.J., Dykman, J.

GARTZKE, P.J. The present and three former secretaries of the Wisconsin Department of Revenue (DOR) appeal from an order certifying the plaintiff class of federal retirees, preliminarily enjoining DOR from taxing retirement benefits received by the class, and denying defendants' motion to dismiss in part. We granted defendants leave to appeal pursuant to sec. 808.03(2), Stats. The issues are whether: (1) the trial court had jurisdiction to issue the preliminary injunction; (2) subsequent legislation has mooted the issues; and (3) the court abused its discretion by certifying the plaintiff class.

We conclude plaintiffs have a cause of action for an injunction under sec. 1983,[1] the case is not moot, and the court did not abuse its discretion in certifying the class. We hold that the former DOR secretaries in their official capacities are not proper parties to the action. We remand with directions that judgment be entered dismissing the action against the former DOR secretaries in their official capacities (but not in their personal capacities) and otherwise affirm the order appealed from.

1. FACTS

This action results from the decision of the United States Supreme Court in *Davis v. Michigan Dep't of*

---

[1] 42 U.S.C. sec. 1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Treasury, 489 U.S. ——, 103 L. Ed. 2d 891 (1989). In that case, Davis petitioned for a refund of Michigan state income taxes he paid on his federal retirement benefits. *Id.*, 103 L. Ed. 2d at 899. Michigan exempted from taxation retirement benefits paid by the state or its political subdivisions. Because Michigan did not exempt federal retirement benefits from taxation, Davis claimed that the tax scheme discriminated against federal employees, contrary to 4 U.S.C. sec. 111.[2] The Court agreed.

The *Davis* Court held that 4 U.S.C. sec. 111 applies to federal retirees as well as current employees. 103 L. Ed. 2d at 900. The Michigan income tax statute discriminated against federal employees and in favor of retired state employees, *id.* at 904, and the inconsistent treatment was not justified by significant differences between the two classes, *id.* at 905. For that reason, the Michigan tax statute violated the principles of intergovernmental tax immunity "granted or retained by" sec. 111. *Id.* at 904. Michigan conceded that a tax refund to Davis was appropriate. *Id.* at 906. The Court remanded the matter to the Michigan courts to determine a proper remedy. *Id.* at 907.

From 1963 to 1988, Wisconsin exempted from income taxation all payments received from the retirement benefits systems for those state public school teachers and employees of the county and city of Milwaukee who were members of the systems as of December 31, 1963. Sec. 71.05(1)(a), Stats. 1987; sec. 71.03(2)(d), Stats. 1965 to 1985; sec. 71.03(2)(g), Stats. 1963. Wisconsin did not exempt any federal retirement benefits. The complaint in this action is directed against that disparate treatment.

---

[2] 4 U.S.C. sec. 111 provides:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

The Wisconsin legislature has eliminated the disparity as to tax years starting in or after 1989. For those years, the exemption also applies to payments received from the United States civil service or military retirement systems if the recipients were members of a federal retirement system on December 31, 1963. Secs. 1817m and 3203(48)(bg), 1989 Wis. Act. 31.

Plaintiffs commenced this action on April 17, 1989. Jerome Poker alleges that the United States Postal Service employed him for twenty-eight and one-half years and that he received federal retirement benefits in the years 1985 through 1988. Gerard Hogan alleges that the Federal Bureau of Investigation employed him for thirty-two years and that he received federal retirement benefits in the years 1982 through 1988. Both plaintiffs allege they paid Wisconsin income tax on the benefits received before 1988 and that they will pay such tax on the benefits received in 1988.

Plaintiffs allege that the defendant DOR secretaries, in their personal and official capacities, discriminated against plaintiffs and in favor of state and local employees by taxing plaintiffs' federal retirement benefits. They aver that defendants have violated the supremacy clause, United States Const. art. VI, cl. 2, principles of intergovernmental tax immunity articulated in *Davis*, and 4 U.S.C. sec. 111. They ask for declaratory, injunctive, and monetary relief. The monetary relief consists of damages from monies unlawfully collected from plaintiffs by way of the unlawful tax on their federal retirement benefits. They do not allege that the former secretaries presently have official duties with DOR.

After issue was joined, defendants moved to dismiss the action on grounds that: the circuit court lacks jurisdiction over the defendants; the circuit court lacks subject matter jurisdiction; because of sovereign immunity defendants may not be sued in their official capacities; defendants are qualifiedly immune from suit in their per-

sonal capacities; and plaintiffs fail to state a claim upon which relief can be granted. We treat the motion as one for judgment on the pleadings made pursuant to sec. 802.06(3), Stats.

Plaintiffs moved for class certification under sec. 803.08, Stats.,[3] and for a preliminary injunction. The proposed class was described as all present and former Wisconsin residents who in any of the years 1982 through 1988 paid income taxes to Wisconsin on federal retirement benefits and who were members of a federal system on December 31, 1963. The proposed preliminary injunction was to preclude enforcement of sec. 71.05(1)(a), Stats. 1987, against plaintiffs and to require all funds collected in the future for the years in issue under that statute be held in constructive trust by defendants for plaintiffs. The trial court granted plaintiffs' motion and denied defendants' motion in part. The court decided only some of the issues raised by defendants' motion to dismiss, apparently at their request.[4] The preliminary injunction restrains the defendants from collecting taxes under and enforcing sec. 71.05(1)(a) from June 15, 1989 (the date the motion was granted) forward pending resolution of the merits of the case.

The trial court supported its order with findings of fact and conclusions of law. It found and concluded that: it has personal jurisdiction over the named defendants, subject matter jurisdiction over the action, and concurrent jurisdiction with the federal courts over claims brought under 42 U.S.C. sec. 1983; declaratory and injunctive re-

[3] Section 803.08 provides: "When the question before the court is one of a common or general interest of many persons or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole."

[4] At hearing, defendants' counsel stated: "I want to make it clear for the record that my motion . . . was a jurisdictional motion and it was not addressed to the merits of the plaintiffs' claim."

lief as well as money damages are remedies available under sec. 1983; a violation of 4 U.S.C. sec. 111 is actionable under sec. 1983; and a reasonable probability exists that (a) the state has waived or is estopped from asserting sovereign immunity, (b) plaintiffs are not required to exhaust administrative remedies for refunds, (c) sec. 71.05(1)(a), Stats. 1987, and its predecessor statutes violate 4 U.S.C. sec. 111,[5] (d) sec. 71.05(1)(a) is unconstitutional on its face, and (e) by enforcing sec. 71.05(1)(a), defendants violated the federal constitution and laws.

The trial court further found and concluded that: continuing to impose tax liability on the named plaintiffs and those similarly situated would result in irreparable injury to them; the issues in litigation involve common and general interests shared by all members of the class to be certified; the named plaintiffs fairly represent those interests and their interests do not conflict with the interests of others in the class; the class includes at least 25,000 persons; it would be impracticable to bring all the parties before the court; the named plaintiffs and their counsel are diligently and competently litigating the action; and the action is properly conducted as a class action under sec. 803.08, Stats.

Based on its findings and conclusions, the trial court ordered: DOR personnel are preliminarily enjoined from June 13, 1989 forward so that (a) they may not collect or impose on the plaintiff class Wisconsin income tax on retirement benefits received from the United States, (b) any money DOR collects shall be held in constructive trust, (c) all applicable DOR personnel shall be informed of the terms of the order; the class represented by the

---

[5] The trial court did not use "reasonable probability" language in its conclusion that sec. 71.05(1)(a) violates 4 U.S.C. sec. 111. We infer that was a slip of the pen and that the court intended to limit its conclusions to whether it had jurisdiction under sec. 1983 and whether plaintiffs had a reasonable probability of success on the merits.

named plaintiffs is certified as all present and former Wisconsin residents, and their successors in interest, who paid income tax to the state on retirement benefits paid them by the United States and who were members of a United States retirement system as of December 31, 1963; counsel for the named plaintiffs shall be sole lead counsel for the class; and notice shall not be given the class until resolution of further legal issues on the merits.

As we have said, the order reached only some of the issues raised by defendants' motion to dismiss. The trial court held that it had personal jurisdiction over the parties, subject matter jurisdiction over the 42 U.S.C. sec. 1983 claim, the defendants in their official capacities are not immune from suit for injunctive relief, and the complaint therefore states a claim. We affirm those holdings.[6]

The trial court did not decide whether the defendants in their official capacities are "persons" for purposes of a claim for damages under 42 U.S.C. sec. 1983 or whether defendants in their personal capacities are qualifiedly immune from such a claim. We do not decide those undecided issues.

2. JURISDICTION

Defendants argue that the trial court lacks jurisdiction for three reasons: (1) a claim for refund of state taxes paid to the state treasury may not be maintained under 42 U.S.C. sec. 1983; (2) a violation of 4 U.S.C. sec. 111 does not give rise to a cause of action under sec. 1983, and (3) because this action could not be maintained in a federal court, it cannot be maintained in a state court. We reject each contention as it relates to this appeal.

We need not decide whether the trial court has jurisdiction to entertain a damages action against the state.

---

[6] Personal jurisdiction is not an issue on appeal.

That issue is not before us.[7] We deal only with the jurisdiction of the court to grant injunctive relief under sec. 1983. The trial court has such jurisdiction.

Official-capacity actions for prospective relief are not treated as actions against the state. *Will v. Michigan Dep't of State Police*, 491 U.S. ——, 105 L. Ed. 2d 45, 58 n.10 (1989). For that reason, a state official sued for injunctive relief in his or her official capacity is a "person" under 42 U.S.C. sec. 1983. *Id.* State officials sued in that manner are not entitled to the sovereign's immunity from suit. *Id*; *John F. Jelke Co. v. Beck*, 208 Wis. 650, 661, 242 N.W. 576, 581 (1932) (circuit court may enjoin state officials from enforcing unconstitutional statute which for that reason "is not a law"). Consequently, because plaintiffs request prospective relief, this action may be maintained under sec. 1983, unless a violation of 4 U.S.C. sec. 111 does not create a cause of action under sec. 1983.

Although no other appellate court has reached the question, we conclude that a violation of 4 U.S.C. sec. 111 creates a cause of action under 42 U.S.C. sec. 1983. Section 1983 provides various remedies, including equitable relief, for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." Section 111 either is "an affirmative statutory grant of immunity" or it "preserves the traditional constitutional prohibition against discriminatory taxes." *Davis*, 103 L. Ed. 2d at 904. Private individuals who are subjected to discriminatory taxation enjoy the protection of the same immunity. *Id.* at 904-05.

Just as the Michigan tax statute reviewed in *Davis* was invalid because it discriminated against federal employees

---

[7] The issue did not arise in *Davis*, a refund case. We note, however, that *Will v. Michigan Dep't of State Police*, 491 U.S. ——, 105 L.Ed.2d 45 (1989), precudes sec. 1983 actions brought in state court to recover damages from the state unless the state has consented to suit.

and therefore violated 4 U.S.C. sec. 111, so the Wisconsin tax statute probably violates sec. 111.[8] For that reason, the Wisconsin statute probably deprives plaintiffs of one of the "immunities secured by the Constitution and laws," and 42 U.S.C. sec. 1983 provides plaintiffs with a remedy. As we have said, injunctive relief against state officials is a remedy available under sec. 1983.

We reject defendants' argument, based on *Felder v. Casey*, 487 U.S. 131, 101 L. Ed. 2d 123 (1988), that this 42 U.S.C. sec. 1983 action nevertheless cannot be maintained in state court. Defendants say this action would have been dismissed had it been brought in federal court, and therefore *Felder* requires that it be dismissed in state court. The *Felder* court declared it was Congress's desire that the federal civil rights laws be given a uniform application within each state, and that a state court procedure "that predictably alters the outcome of sec. 1983 claims depending solely on whether they are brought in state or federal court within the same state is obviously inconsistent with this federal interest in intra-State uniformity." *Id.*, 101 L. Ed. 2d at 123. Defendants note that in *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981), the Court dismissed a sec. 1983 action for money damages resulting from allegedly unconstitutional tax assessments on grounds that maintenance of such actions violated federal principles of comity and that resort to state administrative tax procedures or other adequate state law remedies was first required. *Id.* at 116.

McNary is inapposite for two reasons. First, the comity principle restricts federal court interference with state governments. *Id.* at 103. That interference will not occur

---

[8] Neither the trial court nor this court has decided whether the former Wisconsin tax statute violated 4 U.S.C. sec. 111 as interpreted by *Davis*. For that reason, we limit our language to "probably," the standard required for a preliminary injunction.

here. This action is in state court.[9] Second, the plaintiffs seek injunctive relief as well as damages.

Defendants assert, however, that injunctive relief is not available in federal courts and should not be available in state courts. They rely primarily on a North Dakota decision which refused to enjoin enforcement of that state's own tax statutes under 42 U.S.C. sec. 1983. *Linderkamp v. Bismarck School Dist. No. 1*, 397 N.W.2d 76 (N.D. 1986). The *Linderkamp* court cited the Tax Injunction Act, 28 U.S.C. sec. 1341,[10] which prohibits federal district courts from enjoining the enforcement of state tax laws. The court held that the federal jurisdictional limitations of the act "do not *per se* apply to proscribe state court sec. 1983 jurisdiction. However, we will look . . . to the provisions of the federal act in determining whether similar limitations under state law are appropriate." 397 N.W.2d at 79 (following *Zizka v. Water Pollution Control Auth. of Windham*, 490 A.2d 509 [Conn. 1985]). The court concluded that such limitations were indeed "appropriate" under North Dakota law. The court held that a taxpayer may not obtain an injunction via sec. 1983 from a North Dakota court to enjoin the collection of a state tax. *Id.* at 80.[11]

---

[9] We recognize that other state courts have read *McNary* as applying to actions in state courts. Defendants cite *Raschke v. Blancher*, 491 N.E.2d 1171 (Ill. App. Ct. 1986), *Stufflebaum v. Panethiere*, 691 S.W.2d 271 (Mo. 1985) (en banc), and *Johnston v. Gaston County*, 323 S.E.2d 381 (N.C. Ct. App. 1984). We do not read *McNary* as creating any limitation on sec. 1983 actions in state courts.

[10] 28 U.S.C. sec. 1341 provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

[11] The taxpayers in *Linderkamp* had obtained an injunction under the North Dakota declaratory judgment act. The effect of the court's holding was to deny the taxpayers an award of attorney's fees under 42 U.S.C. sec. 1988.

We agree with the *Linderkamp* court's conclusion that the Tax Injunction Act does not affect a state court's jurisdiction over a claim for an injunction under 42. U.S.C. sec. 1983.[12] We do not conclude that the limitations in the Tax Injunction Act are appropriately applied to an action in a Wisconsin court to enjoin enforcement of a Wisconsin tax statute. Whether such limitations are appropriate involves weighty public policy decisions.

The Wisconsin Court of Appeals does not decide public policy for this state. That function is reserved exclusively to our state supreme court. *In re F.E.H.*, 149 Wis.2d 237, 242, 440 N.W.2d 799, 802 (Ct. App. 1989). And that court has already declared that it is "appropriate" for the courts of this state to hear 42 U.S.C. sec. 1983 actions. *Terry v. Kolski*, 78 Wis.2d 475, 496-97, 254 N.W. 2d 704, 712 (1977). If it is somehow inappropriate for our courts to exercise their jurisdiction in sec. 1983 actions which seek to enjoin enforcement of Wisconsin's tax law, we trust the supreme court will so declare.[13]

We conclude that the trial court has jurisdiction to issue an injunction enjoining state officials from enforcing the tax statute involved.[14]

---

[12] A majority of states have refused to enjoin state tax procedures under sec. 1983. *See* Comment, *Section 1983 in State Court: A Remedy for Unconstitutional State Taxation*, 95 Yale L.J. 414, 427-28 & n.79 (1985) (collecting cases); *Owner-Operators Indep. Drivers v. State*, 553 A.2d 1104 (Conn. 1989); *Vann v. DeKalb County Board of Tax Assessors*, 367 S.E.2d 43 (Ga. Ct. App. 1988); *but see Bung's Bar & Grille v. Township Council of Florence*, 502 A.2d 1198 (N.J. Super. Ct. Law Div. 1985).

[13] *Felder* does not restrict state court jurisdiction in any manner. It struck down a state procedure that discouraged sec. 1983 claims from being brought in state courts, in cases where both state and federal courts have jurisdiction.

[14] The trial court also has jurisdiction over the defendants in their personal capacities. At this point in the litigation it is another question, which we need not decide, whether in their personal

3. MOOTNESS

Effective with the 1989 tax year, sec. 1817m, 1989 Wis. Act 31, exempts from state income taxation the pension income of federal retirees in the certified class. The new law does not affect the liability of federal retirees for pre-1989 tax years under sec. 71.05(1)(a), Stats. 1987, or its predecessors. Accordingly the issues in this action relating to pre-1989 tax years have not been mooted by the new legislation.

Defendants nevertheless assert that whatever right plaintiffs may have had to relief before the amendment, that right is gone. They rely on *Lister v. Board of Regents*, 72 Wis.2d 282, 240 N.W.2d 610 (1976). In *Lister* the plaintiffs alleged that while they were students at the University of Wisconsin, they were improperly denied resident status and therefore paid tuition as non-residents. They sought damages for the resulting difference in tuition they had paid and a declaration of their right to have been classified as residents. *Lister* court held that because the action was in effect one for damages, the plaintiffs were not entitled to declaratory relief. *Id.* at 308, 240 N.W.2d at 625.

The case before us is easily distinguished from *Lister*. Here the plaintiffs seek an injunction as well as damages and declaratory relief. The only issue before us in this appeal is the propriety of the injunction and the certification of the class. We need not decide whether the plaintiffs are entitled to declaratory relief when they also seek damages.

However, while the former DOR secretaries are proper party defendants in their personal capacities, the trial court should have dismissed the action against them in their official capacities. Section 803.10(4)(a), Stats., provides in relevant part: "When a public officer . . . is a

---

capacities the defendants are entitled to qualified immunity from suit under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

party to an action in an official capacity and during its pendency dies, resigns, or otherwise cease to hold office, the action does not abate and the successor is automatically substituted as a party." That statute is essentially identical to Fed. R. Civ. P. 25(d)(1). Under that rule, it is improper to name as defendants in a lawsuit former officials in their offical capacities when they no longer serve in any relevant official position.[15] *Massachusetts Hospital Ass'n v. Harris*, 500 F. Supp. 1270, 1283 (D. Mass. 1980) (citing Fed. R. Civ. P. 25(d)(1) advisory committee note on 1961 amendments). We accept that holding. The present DOR secretary is a named defendant in his official capacity. Naming the former secretaries in their official capacities is redundant. Our ruling does not affect their status as defendants in their personal capacities.

4. CLASS CERTIFICATION

The class certified is in substance "[a]ll present and former Wisconsin residents who paid income taxes to the State of Wisconsin on the retirement benefits paid to them by the United States government" who were members of their retirement systems as of December 31, 1963.

Certification of a class under sec. 803.08, Stats., is a discretionary determination. *Sisters of St. Mary v. AAER Sprayed Insulation*, 151 Wis.2d 708, 713, 445 N.W.2d 723, 725 (Ct. App. 1989). The prerequisites for class certification are: (1) all class members share a common interest; (2) the named parties fairly represent that interest; and (3) it is impracticable to bring all interested parties before the court. *Id.* at 713-14, 445 N.W.2d at 725.

Defendants suggest that the interests of the named and class plaintiffs diverge. Because neither named plaintiff receives a military pension, defendants argue that military pensioners must be excluded from the class.

---

[15] If the name of the current official is unknown, he or she may be described as a party by official title rather than by name. Sec. 803.10(4)(b), Stats; Fed. R. Civ. P. 25(d)(2).

Plaintiffs aptly respond that all members of the class need not share all interests but only *a* common interest. "The test for common interest is whether all members of the purported class desire the same outcome of the suit that the alleged representatives of the class desire." *Mercury Records v. Economic Consultants*, 91 Wis.2d 482, 490, 283 N.W.2d 613, 617 (Ct. App. 1979). Defendants provide no reason for believing that military pensioners desire a different outcome in this case than do other federal retirees.

It is true that class certification may properly be denied if the common interests of the named and class plaintiffs are outweighed by divergent interests. *Goebel v. First Fed. Sav. & Loan*, 83 Wis.2d 668, 684, 266 N.W.2d 352, 360 (1978). And defendants argue that the class's potential responsibility for attorney's fees is such a divergent interest. They fail, however, to note that the trial court has permitted class members to "opt out" of the class on request. That cures the defect of which defendants complain.

Defendants next argue that the present class action is tantamount to a suit for tax refunds. They cite cases from other states holding that class actions for tax refunds may not be maintained because of sovereign immunity principles. *Henderson v. Carter*, 195 SE.2d 4 (Ga. 1972); *Aronson v. City of Pittsburgh*, 510 A.2d 871 (Pa. Commw. Ct. 1986); *Lick v. Dahl*, 285 N.W.2d 594 (S.D. 1979). We reject defendants' position. Insofar as injunctive relief is sought, this is not a tax-refund suit. Insofar as damages are sought, the sovereign immunity issue is not before us.

Defendants finally argue that class certification is inappropriate because it will be burdensome to administer. Manageability of a class action is a proper consideration. *Sisters of St. Mary*, 151 Wis.2d at 714, 445 N.W.2d at 725. They suggest that ultimately each class member must supply amended tax returns for each year they were

affected showing the amount of the refund to which they are entitled. The trial court has, however, reserved decision as to notification of the class and implicitly what the members must do to obtain relief. The trial court has not resolved the manageability issue. We will not decide that issue for the trial court.

We conclude that the trial court has not been shown to have abused its discretion by certifying the class.[16] We affirm that portion of the order.

5. CONCLUSION

The trial court has jurisdiction over this sec. 1983 action. The matter has not been resolved by later legislation. The court did not abuse its discretion in certifying the plaintiff class. We therefore affirm the order granting injunctive relief and certifying the class.

Because the present secretary in his official capacity is a named defendant, the former secretaries in their official capacities are not proper parties. We direct the trial court on remand to enter a judgment for the former secretaries in their official capacities that dismisses the action against them, they to remain defendants in their personal capacities.

By the Court.—Order affirmed except as to former secretaries in their official capacities and cause remanded with directions and for further proceedings.

Recommended for publication in the official reports.

---

[16] Defendants argued for the first time in their reply brief that the trial court abused its discretion by issuing a preliminary injunction. We do not review the issue. *See Sisters of St. Mary*, 151 Wis.2d at 724 n.4, 445 N.W.2d at 729 (appellate court will not review issue raised for first time in reply brief). It is immaterial that plaintiffs raised the issue in their brief as respondents. They did not do so to present an alternate ground for upholding the injunction. *Cf. Auric v. Continental Cas.*, 111 Wis.2d 507, 516, 331 N.W.2d 325, 329-30 (1983) (respondent need not cross-appeal to raise alternate ground supporting judgment). Defendants' reply on that issue was unnecessary.

APPENDIX C

CIRCUIT COURT
STATE OF WISCONSIN
DANE COUNTY

Case No. 89-CV-2007
Branch 3

J. GERARD HOGAN, DOLORES M. HOGAN (residing at 15380 Westover Road, Elm Grove, Wisconsin 53122), JEROME S. POKER and MARGARET H. POKER, (residing at 7050 H. North Presidio Drive, Milwaukee, Wisconsin 53223) on behalf of themselves and all residents of the State of Wisconsin who were paid retirement benefits by the United States Government in any one or all of the years 1982, 1983, 1984, 1985, 1986, 1987, and 1988, similarly situated,

Plaintiffs,

v.

MARK E. MUSOLF, individually and as former secretary of the State of Wisconsin Department of Revenue, MICHAEL LEY, individually and as former secretary of the State of Wisconsin Department of Revenue, KAREN A. CASE, individually and as former secretary of the State of Wisconsin Department of Revenue, MARK D. BUGHER, individually and as secretary of the State of Wisconsin Department of Revenue, and all their unknown agents, employees, successors in office, assistants and all others acting in concert or cooperation with the current and former secretaries of the State of Wisconsin Department of Revenue or at the direction of the current and former secretaries of the State of Wisconsin Department of Revenue,

Defendants.

ORDER FOR PRELIMINARY INJUNCTION
AND CLASS CERTIFICATION

The above-entitled matter came on for hearing on the 13th day of June, 1989 in the Circuit Court of Dane

County, the Honorable P. Charles Jones, Circuit Judge, presiding. The plaintiff class appeared by their counsel, Attorney Eugene O. Duffy, William A. Wiseman and Mark S. Poker of O'Neil, Cannon & Hollman, S.C. The defendants appeared by their counsel, F. Thomas Creeron, Esq., Assistant Attorney General, Department of Justice, State of Wisconsin. The motions of the named plaintiffs and defendants motion to dismiss for lack of jurisdiction, having come on to be heard, and the same having been duly considered by the court after presentation of the written submissions of the parties and oral argument by the parties hereto, and pursuant to the findings stated orally upon the record, the COURT HEREBY FINDS AND CONCLUDES:

1. The Court has personal jurisdiction over the named defendants in their individual and official capacities.

2. The Court has subject matter jurisdiction over this action.

3. The defense of "qualified immunity", which is only applicable to the suit against the defendants in their individual capacities, is an affirmative defense and does not deprive the Court of jurisdiction.

4. Wisconsin State Courts have concurrent jurisdiction over claims brought under 42 U.S.C. § 1983. Declaratory and injunctive relief as well as money damages are available remedies under 42 U.S.C. § 1983.

5. There is a reasonable probability that the State of Wisconsin, which may be a party in interest in the action, has waived sovereign immunity. In addition, there is a reasonable probability that the State of Wisconsin may be estopped from asserting sovereign immunity.

6. There is a reasonable probability that plaintiffs were not required to exhaust their administrative remedies

because such an undertaking would be futile and the holding in *Felder v. Casey*, 108 S.Ct. 2302 (1988) relieves plaintiffs of such a burden.

7. Wis. Stat. § 71.05(1)(a) violates 4 U.S.C. § 111 in that it discriminates in favor of retired state and local employees and against retired federal civilian employees and military personnel. For purposes hereof all references to Wis. Stat. § 71.05(1)(a) include all predecessor sections of this statute.

8. A violation of 4 U.S.C. § 111 is actionable under 42 U.S.C. § 1983. Therefore, plaintiffs' cause of action pursuant to 42 U.S.C. § 1983 is valid and actionable.

9. It is a reasonable probability that Wis. Stat. § 71.05 (1)(a) is unconstitutional on its face in that it discriminates in favor of retired state and local employees and against retired federal civilian employees and military personnel in violation of the United States Constitution and statutes.

10. It is a reasonable probability that conduct of Defendants in enforcing this income tax scheme, and in continuing to enforce this income tax scheme, does violate and will continue to violate the United States Constitution and statutes.

11. It, therefore, appears that Plaintiffs are entitled to relief, part of which consists of preliminarily enjoining Defendants from collecting, asserting, imposing or otherwise attempting to collect, assert or impose any tax liability upon or against any Plaintiff herein or any others similarly situated, arising out of such parties' receipt of retirement benefits from the federal government from January 1, 1982 forward.

12. The continuation of collecting, asserting or imposing such tax liability upon Plaintiffs or others similarly situated would result in irreparable injury to Plaintiffs or others similarly situated.

13. The issue before the court in this action involves a common and general interest shared by all of the members of the class; the named plaintiffs in this action, fairly represent the interests involved in this litigation; and in view of the fact that the class includes not less than 25,000 persons, it would be impractical to bring all the parties before the court. Accordingly, this action is properly brought under Wis. Stat. § 803.08 as a class action. Moreover, in view of the nature of the rights in issue in this case, and the fact that this extremely large class consists, in substantial part, of elderly class members, the court is of the view that it is compelled to exercise its discretion in favor of certifying the class in order to protect the constitutional interests here involved.

14. The court also finds that the named plaintiffs' interests are not in conflict with other members of the class. In addition, the named plaintiffs' attorneys are qualified, experienced and able to conduct this litigation.

15. The court also takes note that from the very outset of this litigation, the named plaintiffs and their counsel, as evidenced by the steps initiated immediately upon the commencement of this litigation, are diligently, competently, and zealously litigating this action.

16. The court concludes that it shall postpone notice to the plaintiff class until there has been a full adjudication of the constitutional issues in this case and the remedies to which the class is entitled. Thereafter, on such conditions as then may be determined by the court, appropriate notice shall be issued to the class.

BASED UPON THE FOREGOING,

IT IS ORDERED pursuant to Wis. Stat. § 813.02 that the Defendants, and all of their agents, employees, succes-

sors in office, assistance and all others acting in concert or cooperation with them or at their direction and under their control are hereby preliminarily ordered, enjoined and restrained from collecting, asserting, imposing or otherwise attempting to collect, assert, or impose any tax or liability upon or against any person or entity arising from or under Sec. 71.05(1)(a) from June 13, 1989 forward pending the resolution of this action on the merits. This preliminary injunction applies, without limitation, to all estimated taxes, and individual taxes due under extended 1988 individual returns, which taxes are due to the imposition of Wisconsin income tax upon the federal retirement benefits of the class. In the event any monies are collected under Wis. Stat. § 71.05(1)(a), notwithstanding the injunction issued herein, any and all such money shall be held in constructive trust by the Defendants.

IT IS FURTHER ORDERED that Defendants, and all of their agents, employees, successors in office, assistants and all others acting in concert or cooperation with them or at their direction and under their control, desist and refrain from acting to enforce collection of any purported tax resulting from or attributable to the imposition of Wisconsin income tax upon the federal retirement benefits received by Plaintiffs and all others similarly situated from 3:45 p.m. June 13, 1989 forward until further order of this Court.

IT IS FURTHER ORDERED that Defendants shall take all necessary action to insure that all audit, appellate, collection and taxpayer assistance personnel of the Wisconsin Department of Revenue ("WDOR") as well as all contract collection agents, agencies and/or attorneys, engaged or previously engaged by the WDOR for the collection of the tax, are made aware of the terms of this Order and directed to conform their conduct hereto.

IT IS FURTHER ORDERED, that the class represented by the named plaintiffs be, and it is certified as follows:

All present and former Wisconsin residents, who paid income taxes to the State of Wisconsin on the retirement benefits paid to them by the United States government, and who are members of any of the following subgroups:

i) all natural persons who are retired federal civilian employees and/or U.S. military (both active and reserve from all branches of the Armed Services and the U.S. Coast Guard) personnel, and who were members of a United States Government retirement system or fund as of December 31, 1963, including all such persons who by operation of federal law have a constructive date of employment or service on or before such date for purposes of eligibility for retirement;

ii) all natural persons who are retired federal civilian employees and U.S. military (both active and reserve, from all branches of the Armed Services and the U.S. Coast Guard) personnel and who were retired under a United States Government retirement system or fund as of December 31, 1963;

iii) all natural persons who are the survivors of any persons in i) or ii) above and who are or were receiving a survivor annuity in any of the years enumerated above under a United States Government retirement system or fund; and

iv) the executors, personal representatives, legal representatives or successors in interest of or to any of the natural persons identified as are now deceased or otherwise under legal disability.

Any member of such class may opt out of the class only by specific individual request to do so.

IT IS FURTHER ORDERED, that counsel for the named plaintiffs, Eugene O. Duffy, Willam A. Wiseman

and Mark S. Poker as assisted by Dean P. Laing and Gregory Lyons, all of the law firm of O'Neil, Cannon & Hollman, S.C. of Milwaukee, Wisconsin, shall be sole lead counsel for the plaintiff class.

IT IS FURTHER ORDERED, that the nature of the class relief requested, that being for declaratory and injunctive relief, shall not require notice to be given to all potential members of such class except after judgment on the constitutional issues and the incidental remedies of money damages.

Dated at Madison, Wisconsin this 15 day of June, 1989.

BY THE COURT:

/s/ P. Charles Jones
HONORABLE P. CHARLES JONES
Circuit Court Judge

APPENDIX D

SUPREME COURT
OF WISCONSIN
P.O. BOX 1688
MADISON, WI 53701-1688

Appeal No. 89-1175

T.Ct. No. 89 CV 2007

J. GERARD HOGAN, DELORES M. HOGAN, JEROME S. POKER, MARGARET H. POKER, on behalf of themselves and all residents of the State of Wisconsin who were paid retirement benefits by the United States government in any one or all of the years 1982, 1983, 1984, 1985, 1986, 1987 and 1988, similarly situated,

Plaintiffs-Respondents,

v.

MARK E. MUSOLF, individually and as former secretary of the State of Wisconsin Department of Revenue, MICHAEL LEY, individually and as former secretary of the State of Wisconsin Department of Revenue, KAREN A. CASE, individually and as former secretary of the State of Wisconsin Department of Revenue, MARK D. BUGHER, individually and as secretary of the State of Wisconsin Department of Revenue, and all their unknown agents, employees, successors in office, assistants and all others acting in concert or cooperation with the current and former secretaries of the State of Wisconsin Department of Revenue or at the direction of the current and former secretaries of the State of Wisconsin Department of Revenue,

Defendants-Appellants-Petitioners.

REMITTITUR

THIS CAUSE WAS A REVIEW OF THE ORDER/DECISION OF THE COURT OF APPEALS. ON CONSIDERATION WHEREOF, IT IS NOW HERE ORDERED AND ADJUDGED BY THIS COURT IN AN OPINION FILED ON JUNE 26, 1991, THAT:

The decision of the court of appeals is reversed.

SHIRLEY S. ABRAHAMSON Wrote Concurring Opinion 001 PAGES

WILLIAM A. BABLITCH Wrote Decision/Opinion 024 PAGES

THE APPEAL RECORD IS HEREBY RETURNED TO THE CLERK OF CIRCUIT COURT FOR DANE COUNTY.

I certify that the above is a correct transcript of the Original Order and Judgment of the Court in the above-entitled cause.

Dated:

July 30, 1991.

/s/ MLG
MARILYN L. GRAVES
Clerk, Supreme Court

APPENDIX E

EXCERPTS OF RELEVANT WISCONSIN STATUTES
1987-1988

Sec. 71.75 Claims for refund. (1) . . . the provisions for refunds and credits provided in this section shall be the only method for the filing and review of claims for refund of income and surtaxes, and no person may bring any action or proceeding for the recovery of such taxes other than provided in this section.

* * * *

(6) Every claim for refund or credit of income or surtaxes shall be filed with the department of revenue and signed by the person or, in the case of joint returns, by both persons who filed the return on which the claim is based and shall set forth specifically and explain in detail the reasons for and the basis of the claim. After the claim has been filed it shall be considered and acted upon in the same manner as are additional assessments made under s. 71.74(1) and (2). . . .

71.88 Time for filing an appeal. (1) APPEAL TO THE DEPARTMENT OF REVENUE. (a) *Contested assessments and claims for refund.* . . . any person feeling aggrieved by a notice of additional assessment, refund, or notice of denial of refund may, within 60 days after receipt of the notice, petition the department of revenue for redetermination. A petition or an appeal by one spouse is a petition or an appeal by both spouses. The department shall make a redetermination on the petition within 6 months after it is filed.

* * * *

(2) APPEAL TO THE WISCONSIN TAX APPEALS COMMISSION. (a) *Appeal of the department's redetermination of assessments and claims for refund.* A person feeling aggrieved by the department's redetermination

may appeal to the tax appeals commission by filing a petition with clerk of the commission as provided by law and the rules of practice promulgated by the commission. If a petition is not filed with the commission within the time provided in s. 73.01 or, except as provided in s. 71.75 (5), if no petition for redetermination is made within the time provided the assessment, refund, or denial of refund shall be final and conclusive.

73.01(4) [Tax appeals commission]. POWERS AND DUTIES DEFINED. (a) Subject to the provisions for judicial review contained in s. 73.015, the commission shall be the final authority for the hearing and determination of all questions of law and fact arising under sub. (5) and . . . subch. XIV of ch. 71. . . .

* * * *

(e) . . . The decision or order of the commission shall become final and shall be binding upon the petitioner and upon the department of revenue for that case unless an appeal is taken from the decision or order of the commission under s. 73.015. . . .

* * * *

(5) APPEALS TO COMMISSION. (a) Any person . . . who has filed a petition for redetermination with the department of revenue and who is aggrieved by the redetermination of the department may, . . . within 60 days after the redetermination but not thereafter, file with the clerk of the commission a petition for review of the action of the department and the number of copies of the petition required by rule adopted by the commission.

* * * *

(b) The petition shall set forth specifically the facts upon which the petitioner relies, together with a statement of the propositions of law involved, and shall be in such form as the commission by rule designates. After an answer is filed as provided in par. (a), the matter shall be regarded as at issue and the commission shall set it

for hearing. At all times while said appeal is pending before the commission, the petitioner shall keep the commission informed as to his residence. Upon his failure to do so, the mailing by the commission of a notice of hearing, decision and order or other papers by registered mail to his attorney or to the petitioner's last known address shall constitute good and sufficient service. Petitions and answers may be amended under rules to be prescribed by the commission.

73.015 Review of determination of the tax appeals commission. (1) This section shall provide the sole and exclusive remedy for review of any decision or order of the tax appeals commission and no person may contest, in any action or proceeding, any matter reviewable by the commission unless such person has first availed himself or herself of a hearing before the commission under s.73.01 or has cross-appealed under s.70.995(8)(a).

(2)

No. 91-380

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

J. GERARD HOGAN, *et al.*,
Petitioners,

v.

MARK E. MUSOLF, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

---

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

EUGENE O. DUFFY *
GREGORY W. LYONS
MARK S. POKER
O'NEIL, CANNON & HOLLMAN, S.C.
111 East Wisconsin Avenue
Milwaukee, WI 53202-4803
(414) 276-5000
Attorneys for Petitioners

* Counsel of Record

October —, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-380

J. GERARD HOGAN, *et al.*,
Petitioners,

v.

MARK E. MUSOLF, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

---

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully invite the Court's attention to the following new matters which have arisen since the filing of the petition in this case. A petition for writ of certiorari was docketed in this Court on September 17, 1991 in the *Davis*-related case of *Nutbrown v. Munn*, 311 Or. 328, 811 P.2d 131 (1991), *petition for cert. filed*, No. 91-457. The questions presented by the *Nutbrown* petition are substantially similar to questions presented by this case.[1]

On September 9, 1991, the Supreme Court of Tennessee announced its decision in the case of *L.L. Bean, Inc. v. Bracey*, 1991 WL 172407 (Tenn. 1991). Similar to the

---

[1] The decision of the Oregon Supreme Court in *Nutbrown, supra*, is discussed in the Petition in this case at 8, 10.

result reached by the Wisconsin Supreme Court in this case, the *Bean* decision is bottomed on the conclusion that states are free in the first instance to condition or deny a § 1983 cause of action.[2]

These recent developments demonstrate the widening conflict among the states with respect to the obligation of state courts to hear and entertain a federal cause of action created by Congress. Moreover, they further demonstrate a continuing conflict with numerous decisions of this Court. For example in *Bean*, the Tennessee Supreme Court relied heavily upon the pre-*Felder* and pre-*Higgins* state court decision of *Linderkamp v. Bismark School District No. 1*, 397 N.W.2d 76 (N.D. 1986), instead of applying the decisions of this Court. *See, e.g., Felder v. Casey*, 487 U.S. 131 (1988); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 n.10 (1989); *Howlett v. Rose*, —— U.S. ——, 110 S. Ct. 2430 (1990); *Dennis v. Higgins*, —— U.S. ——, 111 S. Ct. 865 (1991).

CONCLUSION

For the reasons set forth above and in the petition for certiorari, Petitioners request that their petition for certiorari be granted.

Respectfully submitted,

EUGENE O. DUFFY *
GREGORY W. LYONS
MARK S. POKER
O'NEIL, CANNON & HOLLMAN, S.C.
111 East Wisconsin Avenue
Milwaukee, WI 53202-4803
(414) 276-5000
* Counsel of Record
Attorneys for Petitioners

October —, 1991

[2] *See* Petition at 10-14.

(3)

No. 91-380

In The

Supreme Court of the United States

October Term, 1991

J. GERARD HOGAN, et al.,

Petitioners,

v.

MARK E. MUSOLF, et al.,

Respondents.

On Petition For Writ Of Certiorari To
The Supreme Court of Wisconsin

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JAMES E. DOYLE
Attorney General of Wisconsin

F. THOMAS CREERON III
Assistant Attorney General
State of Wisconsin
Counsel of Record

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8549

Counsel for Respondents

QUESTION PRESENTED

Should certiorari be granted to consider reinstatement of a claim under 42 U.S.C. § 1983 which challenges the administration of a state taxing statute where:

(1) the challenged statute was amended by the state legislature within four months after the complaint was filed;

(2) the state court of last resort has specifically ruled that, under state law, the administrative agencies that review such claims are not powerless to grant tax refunds to these petitioners and such refund claims have not yet been finally resolved; and

(3) the challenged statute contains unique characteristics requiring further factual development in order to determine individual eligibility for refunds if refunds are required under 4 U.S.C. § 111 (1966).

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

STATE STATUTES

TABLE OF AUTHORITIES - Continued

No. 91-380

In The

Supreme Court of the United States

October Term, 1991

J. GERARD HOGAN, et al,

Petitioner,

v.

MARK E. MUSOLF, et al.,

Respondent.

On Petition For Writ of Certiorari
To The Supreme Court of Wisconsin

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ADDITIONAL STATUTES INVOLVED

I. FEDERAL.

4 U.S.C. § 111 provides in relevant part as follows:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

II. STATE.

Section 71.05, Wis. Stats. (1989-90), as amended by 1989 Wisconsin Act 31, section 1817m, provides in relevant part as follows:

> (1) EXEMPT AND EXCLUDABLE INCOME. There shall be exempt from taxation under this subchapter the following:
>
> (a) *Retirement systems.* All payments received from *the U.S. civil service retirement system, the U.S. military employe retirement system,* the employe's retirement system of the city of Milwaukee, Milwaukee county employes' retirement system, sheriff's annuity and benefit fund of Milwaukee county, police officer's annuity and benefit fund of Milwaukee, fire fighter's annuity and benefit fund of Milwaukee, or the public employe trust fund as successor to the Milwaukee public school teachers' annuity and retirement fund and to the Wisconsin state teachers retirement system, which are paid on the account of any person who was a member of the paying or predecessor system or fund as of December 31, 1963, or was retired from any of the systems or funds as of December 31, 1963, but such exemption shall not exclude from gross income tax sheltered annuity benefits.

SUPPLEMENTAL STATEMENT OF THE CASE

Plaintiffs commenced this action on April 17, 1989, and moved for a preliminary injunction on May 19, 1989, (R. 1, 4). Wisconsin resisted that motion on jurisdictional as well as policy grounds, specifically advising the trial court that legislation responding to the Court's decision in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 109

S. Ct. 1500 (March 28, 1989) was already pending in the Legislature. Effective the day after its publication on August 8, 1989, 1989 Wisconsin Act 31, section 1817m, did in fact exempt for 1989 and subsequent tax years the pension income of all federal retirees who were members of their current retirement system or its predecessor as of December 31, 1963 ("pre-64 federal retirees") by inserting the emphasized language in sec. 71.05, Wis. Stats. (1989-90). The circuit court's June 13, 1989 bench decision finding jurisdiction under § 1983, granting the motion for preliminary injunctive relief and refusing to rule upon the individual defendants' qualified immunity defense was issued prior to the effective date of the statutory amendment.

Noting that the statute had been amended, the Wisconsin Supreme Court dismissed the § 1983 claim in its entirety, leaving the question of qualified immunity unresolved and instructing plaintiffs that their claim for retroactive monetary relief would not mature until their administrative tax refund claims were finally resolved. *Hogan v. Musolf*, 163 Wis. 2d 1, 471 N.W.2d 216, 218, 222 (1991). Since the § 1983 claim was dismissed in its entirety, there is no "final unappealed judicial determination" of any kind as claimed in the petition at 17.[1]

---

[1]The petition is rife with assertions,distortions, inaccuracies and accusations not supported by the record. For example,the record does not even contain any *allegation* of "an unlawful scheme to mislead the members of the petitioners' class for the purpose of extinguishing as many claims as possible." (Petition at 21-22 n.30.)

ARGUMENT

I. THE WISCONSIN SUPREME COURT'S DECISION IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT.

A. No Decision Of This Court Has Determined That A Sovereign State May Not Impose A Requirement Of Prior Resort In Connection With § 1983 Actions Which Challenge The Administration Of State Taxing Statutes.

Congress' purpose in enacting § 1983 was to create a federal forum when no state forum was available. It did not intend to compel any state to create a forum to hear federal claims where no comparable federal forum is available to hear those same federal claims. True, states may not create substantive immunities "from federal liability by relying upon their own common law heritage." *Howlett By And Through Howlett v. Rose*, 110 S. Ct. 2430, 2447 (1990). No court may create substantive immunities, *Tower v. Glover*, 467 U.S. 914, 923 (1984), but states "have great latitude to establish the structure and jurisdiction of their own courts." *Howlett*, 110 S. Ct. at 2441. Thus, there is no "requirement that the State create a court competent to hear the case in which the federal claim is presented." *Id.*, 110 S. Ct. at 2441. *Howlett* itself therefore rejects "[t]he anomaly . . . that a State might be forced to entertain in its own courts suits from which it was immune in federal court . . . ." *Id.*, 110 S. Ct. at 2437.

Felder v. Casey, 487 U.S. 131, 108 S. Ct. 2302 (1988), reinforces the proposition that a state is not required to open its courthouse doors when the federal courthouse doors are closed. Even after *Felder*, a state generally remains free to impose a neutral procedural or jurisdictional rule that may bar the assertion of federal claims. *See State of Missouri v. Mayfield*, 340 U.S. 1, 3

(1950). Such a rule may no longer be applied in a § 1983 action in state court only if it "predictably alters the outcome of § 1983 claims *depending solely on whether they are brought in state or federal court within the same state* [and] is obviously inconsistent with this federal interest in *intra-State uniformity*." *Felder*, 108 S. Ct. at 2314 (emphasis supplied). Since federal courts do not entertain tax-related § 1983 claims, *Felder* does not bar the neutral procedural rule of prior resort established by Wisconsin's Legislature. If anything, the overriding policy considerations in support of intra-state uniformity expressed by the Court in that case *encourage* the establishment of such a neutral procedural rule.

Patsy v. Board of Regents, 457 U.S. 496 (1982) and the other decisions of this Court cited by petitioners do not involve neutral procedural rules which foster the principle of intra-state uniformity, nor do they deal at all with a long line of cases culminating in *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981), which establish the federal courts' obligation to refrain from interfering with state revenue collection activities.

In *McNary*, the Court did not rely upon the Anti-Injunction Act. It held that, under principles of comity and judicial restraint, it would not entertain a § 1983 damage action challenging the constitutionality of state tax assessments. The Court emphasized that it had consistently held, in a long line of cases antedating the passage of the Act, that judicial interference with a state's budgetary, revenue-raising and collection activities would be devastating. *See Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976) (collecting cases). To cite but one example, in *First Nat. Bank v. Board of Com'rs*, 264 U.S. 450, 456 (1924), the Court dismissed a damage action claiming that certain state taxes had been levied in violation of the Constitution: "Plaintiff not having availed itself of . . . [its] administrative remedies . . . it results that the question whether the tax is vulnerable to the challenge in respect to its validity upon any or all of the grounds asserted is one

which we are not called upon to consider." The rationale underlying the equitable principles espoused in these cases has been summarized in the following fashion:

> [S]tate tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency.

Perez v. Ledesma, 401 U.S. 82, 128 n.17 (1971) (Brennan, J., concurring in part and dissenting in part).

These considerations remain exactly the same when a § 1983 action is brought in state court. It makes no difference "whether a state court or federal court entertains a sec 1983 claim without requiring the plaintiffs to resort to the state's administrative procedures." *Hogan*, 471 N.W.2d at 223. Petitioners now claim that Congress, which has codified the doctrine described in *McNary* in the Anti-Injunction Act, has inexplicably required state courts to entertain legal proceedings which are diametrically opposed to the principle of non-interference in state revenue matters embodied in that very act. The sheer incongruity of that proposition belies its validity.

Petitioners would have the Court believe that the fundamental principles so clearly defined in *McNary* are no longer good law. No decision of this Court stands for such a far-reaching proposition.

B. Petitioners Failed To Meet Their Burden Of Proving The Inadequacy Or Futility Of Wisconsin's Administrative Remedies.

Petitioners seemingly suggest that this Court's decisions stand for the proposition that, as a matter of *federal* law, resort to a state administrative agency is always futile or inadequate whenever any claim is made that a state statute is preempted by a federal statute. To establish this point, petitioners then cite various *state* decisions concerning the statutory authority possessed by Wisconsin's administrative agencies.

As to futility, an independent and adequate state ground for the decision below is that "the Department and Commission have the authority to determine whether the continued application of the Wisconsin taxing scheme . . . violates federal law or the constitution." *Hogan*, 471 N.W.2d at 224. Moreover, even where a state chooses to employ an administrative agency as the initial decision-maker, "the State's trial-and-appeals process is treated as a unitary system, and for a federal court to disrupt its integrity by intervening in mid-process would demonstrate a lack of respect for the State as sovereign." *New Orleans Public Serv. v. Council of New Orleans*, 491 U.S. 350, 109 S. Ct. 2506, 2518 (1989). The remedies offered by Wisconsin are also far superior to those upheld in *Rosewell v. LaSalle Nat. Bank*, 450 U.S. 503, 507-08 (1981), where the taxpayer alleged that she had been unable to obtain any relief before the administrative agency in the past, yet the Court held that the availability of subsequent judicial review to cure any defects in the administrative process was sufficient to require that such a process be followed.

As to adequacy, the administrative procedure in *Rosewell* required that the tax be paid and provided for no interest on a successful refund claim. Section 71.82(1)(b), Wis. Stats. (1989-90), provides for interest at the rate of nine percent in the event the tax has been paid. In

Rosewell, 450 U.S. at 514–15, the Court held that a state's remedy is adequate if a taxpayer receives a full administrative hearing and any constitutional claims asserted can be resolved upon subsequent judicial review. Similarly, in *California v. Grace Brethren Church*, 457 U.S. 393, 413 n.30 (1982), the fact that the state administrative agency lacked authority to determine the constitutionality of state statutes did not render that remedy inadequate, since state procedures provided for a full hearing and subsequent judicial review.

This case does not even present a pure question of law. Petitioners' suggestion that factual development concerning their refund claims is unnecessary because prospectivity is the only doctrine that would bar such claims is incorrect. Wisconsin's statutory scheme is unique. Wisconsin never did extend a tax exemption to the majority of its state and local retirees. Exemptions were extended only to teachers and to employes of certain governmental units in Milwaukee County. The exemptions were eliminated effective January 1, 1964, with a grandfather clause for those individuals. Even assuming that prospectivity is not a viable defense to the assertion of petitioners' retroactive refund claims, the Wisconsin Tax Appeals Commission has yet to determine the extent of any "discriminat[ion]" under 4 U.S.C. § 111. If discrimination is found to exist, that body will need to determine which federal retirees are entitled to refunds and how such refunds will be computed. To do so, it will need to consider such factors as residency, the existence of predecessor retirement systems, occupation, geographic location while employed and the tax benefit received by the limited group of state and local retirees who were able to claim the exemption. These are precisely the kinds of factual issues that administrative agencies were designed to resolve.

Petitioners make no reference to the unique character of the statute, which requires the resolution of factual claims. They apparently believe that a simple allegation that administrative remedies are inadequate or

futile is sufficient to bypass established administrative procedures. Since they have not even attempted any meaningful demonstration of such inadequacy or futility, that claim should be rejected out of hand.

C. No Decision Of This Court Establishes That The Wisconsin Supreme Court's Decision Denies Petitioners Due Process Of Law.

Petitioners claim that "various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

This is not one of them. Both Secretary Bugher and Chairman Musolf are indemnified from personal liability under sec. 895.46(1)(a), Wis. Stats. (1989-90). Nor is it true, as claimed in the petition at 22-23 n.31, that "each level of the administrative remedy to which the petitioners have been relegated by the decision below" is "control[led] and direct[ed]" by these two individuals. Section 71.75(7), Wis. Stats. (1989-90), provides that all refund claims not acted upon by the Wisconsin Department of Revenue within one year are deemed granted. Section 71.88(1)(a), Wis. Stats. (1989-90), provides that the Department must act on a petition for redetermination within six months unless an extension agreement is signed, as almost every *Davis*-related claimant has chosen to do. Moreover, Chairman Musolf has recused himself from all *Davis*-related proceedings and therefore is not involved in scheduling or resolving those claims at all (A-1).

Reduced to its essence, petitioners' claim is that the prescribed, exclusive administrative procedure may be avoided simply by suing a decision-maker who is a part of the administrative process. The absurdity of that position tellingly reveals the desperate nature of petitioners' plea to this Court.

D. The Decision Of The Wisconsin Supreme Court Is Not In Conflict With This Court's Decisions Permitting The Assertion Of Claims For Prospective Declaratory Or Injunctive Relief Against Individual State Officials In Actions That Do Not Challenge The Administration Of State Taxing Statutes.

Petitioners cite *Ex parte Young*, 209 U.S. 123 (1908) and *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S. Ct. 2304 (1989) in an effort to establish that they possess viable claims for prospective declaratory and injunctive relief against individual state officials under § 1983. Neither case even purports to address the principles of federalism in the form of deference to state tax administration which were articulated in *McNary*. And, since the statute has been amended, no meaningful claim for prospective declaratory or injunctive relief remains. *See Collins v. Waldron, et al.*, 259 Ga. 582, 385 S.E.2d 74, 75 n.1 (1989).

Contrary to the suggestion in the petition at 7 n.5, the only relevance of *Will* is to petitioners' § 1983 "damage" claims. The Wisconsin Supreme Court recognized that "the damages claimed against the defendants in their individual capacities are essentially a refund claim under a different name." *Hogan*, 471 N.W.2d at 224. *Edelman v. Jordan*, 415 U.S. 651 (1974), stands for the proposition that state officials act in their official capacity and therefore are immune from damages under the Eleventh Amendment unless they "commit torts or other wrongs against the plaintiffs independent of their implementation of state law." *Watkins v. Blinzinger*, 789 F.2d 474, 483 (7th Cir. 1986), *cert. den.*, 481 U.S. 1038 (1987). Under *Will*, 109 S. Ct. at 2311, the sovereign immunity analog to the Eleventh Amendment therefore bars petitioners' § 1983 damage claims brought in state court. Even if petitioners' complaint did state a claim upon which relief in the form

of damages could otherwise be granted against the defendants in their individual capacities, the only reported appellate court decision examining the question indicates that such a claim would not survive the assertion of a qualified immunity defense. *Swanson v. Powers*, 937 F.2d 965 (4th Cir. 1991).

In light of the amendment of the statute, the gravamen of plaintiffs' § 1983 claim is for damages. It would be a meaningless exercise for the Court to consider resuscitating that claim, since it would subsequently have to be dismissed by the Wisconsin courts on sovereign or qualified immunity grounds.

II. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE WISCONSIN SUPREME COURT AND THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT.

Petitioners claim that decisions from state courts in seven jurisdictions are inconsistent with the decision of the Wisconsin Supreme Court.[2] That court held that a state *may* impose a requirement of prior resort in connection with tax-related § 1983 challenges and that, in light of the Court's decision in *Davis*, the Department and the Commission could grant refunds if they choose to do so.

---

[2]*American Trucking v. Secretary of State*, 595 A.2d 1014 (Me. 1991); *Burrell v. Mississippi State Tax Com'n*, 536 So. 2d 848 (Miss. 1988); *Marx v. Truck Renting & Leasing Ass'n*, 520 So. 2d 1333 (Miss. 1987); *Allison v. Johnson Cty. Bd. of Cty. Com'rs*, 241 Kan. 266, 737 P.2d 6 (1987); *Arkansas Writers' Project, Inc. v. Ragland*, 293 Ark. 395, 738 S.W.2d 402 (1987); *Beverly Bank v. Board of Review of Will Cty.*, 117 Ill. App. 3d 656, 453 N.E.2d 96 (1983), *cert. den.*, 466 U.S. 951 (1984); *Bung's Bar & Grille, Inc. v. Florence Tp.*, 206 N.J. Super. 432, 502 A.2d 1198 (1985); *Porter v. Treasurer and Collector, Etc.*, 385 Mass. 335, 431 N.E.2d 934 (1982).

The Wisconsin Supreme Court did not hold that a state *must* impose a requirement of prior resort.

The New Jersey and Illinois decisions are not from state courts of last resort. The latter is undermined by a subsequent decision of the same intermediate appellate court, and the issue involved in this case was never resolved as the result of an express concession by the county taxing agency. *Beverly Bank*, 453 N.E.2d at 99. *Compare Raschke v. Blancher*, 141 Ill. App. 3d 813, 491 N.E.2d 1171 (1986).

There is no suggestion in the Maine, Arkansas and Massachusetts decisions that any requirement of prior resort was asserted to be applicable to tax-related cases. *American Trucking*, 595 A.2d at 1018; *Ragland*, 738 S.W.2d at 403; *Porter*, 431 N.E.2d at 936-37. And, unlike this case, the refund remedy in *Allison*, 737 P.2d at 12, was determined to be inadequate because the assessment procedure followed by the local taxing authority "effectively creat[ed] a lien on . . . their land. The administrative procedure as it existed did not prevent an unconstitutional taking." Finally, the Mississippi decisions refusing to dismiss § 1983 claims for injunctive relief result from the existence of a state statute expressly *permitting* claims for injunctive relief in tax-related cases where a challenge is made to the facial constitutionality of a statute. *Marx*, 520 So. 2d at 1339. Wisconsin's statute expressly bars all claims for injunctive relief in tax-related cases. *Hogan*, 471 N.W.2d at 225. *See Metzger v. Department of Taxation*, 35 Wis. 2d 119, 128-29, 150 N.W.2d 431 (1967).

The decision below is consistent with that of the only other state court of last resort that squarely addresses all of the issues the Wisconsin Supreme Court resolved. *Nutbrown v. Munn*, 311 Or. 328, 811 P.2d 131 (1991), *cert. filed*, No. 91-457 (September 17, 1991). Denial of certiorari in both cases will therefore further enhance the existing consistency in the decisions of state courts of last resort.

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of Wisconsin should be denied.

Dated this 5th day of December, 1991.

JAMES E. DOYLE
Attorney General
State of Wisconsin

F. THOMAS CREERON III
Assistant Attorney General
State of Wisconsin
Counsel of Record

Counsel for Respondents

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8549

No. 91-380

In The

Supreme Court of the United States

October Term, 1991

J. GERARD HOGAN, et al.,

Petitioners,

v.

MARK E. MUSOLF et al.,

Respondents.

On Petition For Writ of Certiorari To
The Supreme Court of Wisconsin

APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

State of Wisconsin\Tax Appeals Commission

Suite 501
217 S. Hamilton Street
Madison, Wisconsin 53702
(608) 266-1391

MEMORANDUM

September 26, 1991

TO: Commissioners Timken, Junceau and Bartley

FROM: Mark E. Musolf, Commission Chairperson

RE: Recusation from Hogan et al v. Musolf et al;
Tax Appeals Commission
Docket No. 91-I-386

Inasmuch as I am a named defendant in the underlying case which precipitated the petition for review herein, which was filed on September 24, 1991, I hereby remove myself from any participation or involvement in this matter now before the Commission.

pc: Attorney Kevin B. Cronin
Wisconsin Department of Revenue

Attorney Eugene O. Duffy
O'Neil, Cannon & Hollman, S.C.

No. 91-380

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

J. GERARD HOGAN, *et al.*,
Petitioners,

v.

MARK E. MUSOLF, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

PETITIONERS' REPLY BRIEF

EUGENE O. DUFFY *
GREGORY W. LYONS
MARK S. POKER
O'NEIL, CANNON & HOLLMAN, S.C.
111 East Wisconsin Avenue
Milwaukee, WI 53202-4803
(414) 276-5000
Attorneys for Petitioners

* Counsel of Record

December 31, 1991

WILSON · EPES PRINTING CO., INC. · 789-0096 · WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-380

J. GERARD HOGAN, *et al.*,
Petitioners,

v.

MARK E. MUSOLF, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

---

PETITIONERS' REPLY BRIEF

REPLY TO STATEMENT OF THE CASE

The trial court did not refuse to rule upon the respondents' qualified immunity defense. The order of the proceedings was agreed to by the parties. TR. 13.[1] The respondents' motion on this issue was pending at the time their petition for an interlocutory appeal was granted. TR. 17.

The respondents' conduct with respect to the rights of the members of the class to obtain relief has been in issue from the outset of this case. TR. 13. The trial court found that judicial intervention was compelled in order to protect these important constitutional interests. *See*

[1] "TR" refers to the record on appeal before the Wisconsin Courts.

Pet. App. C at 41a. The trial court's injunction was carefully tailored to insure that all rights of the class were protected from abridgement during the pendency of this case. *See* Pet. App. C at 42a.

I. THE CONFLICT IS WIDENING

A. States

Avoiding the importance of the federal questions presented, respondents urge a denial of the petition on the basis that there is no state conflict. However, a casual examination of the commentators establishes both the importance of the questions presented by this petition and the conflict among the states' highest courts. *See, e.g.*, Note, *Clarifying Comity: State Court Jurisdiction and Section 1983 State Tax Challenges*, 103 Harv. L. Rev. 1888 (1990); Yuengert, *Does the Tax Injunction Act of 1937 Affect State Court Jurisdiction Over State Tax Challenges Under Section 1983 of the Civil Rights Act of 1871?*, 45 Washington and Lee L. Rev. 381 (1988); Taylor, *Section 1983 in State Court: A Remedy for Unconstitutional State Taxation*, 95 Yale L.J. 414 (1985).

The decisional law of Mississippi illustrates this conflict. In *State Tax Commission v. Fondren*, 387 So. 2d 712 (Miss. 1980), *cert. denied, sub nom. Redd v. Lambert*, 450 U.S. 1040 (1981), the Mississippi Supreme Court refused to entertain a challenge to a state tax brought under 42 U.S.C. § 1983, reasoning that because of the Tax Injunction Act's bar on federal court jurisdiction, taxpayers were required to exhaust state remedies. *Id.* at 723. The basis of the holding in *Fondren* is indistinguishable from the holding in *Hogan*. However, after this Court's decision in *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981), the Mississippi Supreme Court overruled *Fondren*, expressly holding that *Fondren* confused a federal court jurisdictional limitation "with the enforceability of a federally created right and

remedy in state court." *Burrell v. Mississippi State Tax Comm'n*, 536 So. 2d 848, 864 (Miss. 1988).[2]

B. *Hafer v. Melo*

Respondents reassert the argument adopted by the Court below that they are immune under the Eleventh Amendment from "individual" liability for acts committed in the course of their "official" capacity. *See* Respondents' Brief at 10. In *Hafer v. Melo*, 60 U.S.L.W. 4001 (1991), this Court rejected this argument. It held that this distinction urged "finds no support in the broad language of § 1983." *Id.* at 4003. It also held that this "distinction cannot be reconciled with our decisions regarding immunity of government officers otherwise personally liable for acts done in the course of their official duties." *Id.* The court also rejected the Eleventh Amendment argument advanced here, noting that " 'it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law.' " *Id.* at 4004. (citation omitted).[3] Thus, un-

---

[2] *See also* the *Davis*-related case of *Barker v. State of Kansas*, No. 91-611, *cert. granted* (November 27, 1991), where the trial court rejected the assertion of an exhaustion requirement similar to that imposed by Wisconsin.

[3] Respondents imply that review is unnecessary since they will ultimately succeed on the damages claim under the defense of qualified immunity. Petitioners note that this defense has not yet been considered by the trial court and is not now before the Court in this Petition. Petitioners also note, however, that it is unlikely that the respondents will prevail on this defense because it is not available to them in the first instance.

As this Court has held "[s]ection 1983 immunities are 'predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.' " *Tower v. Glover*, 467 U.S. 914, 920 (1984) (citations omitted). In 1871, tax officials enjoyed no such immunity. *See, e.g., Osborn v. Bank of the United States*, 22 U.S. 738 (1824); *Erskine v. Van Arsdale*, 82 U.S. 75 (1872); *Atchison & C. Ry. Co. v. O'Connor*, 223

der *Hafer*, the respondents may be held individually liable under section 1983 for acts performed in the course of their official duties. The *Hogan* decision cannot be reconciled with *Hafer*. Petitioners contend that this significant conflict, *alone*, warrants review and reversal of *Hogan* by this Court.

II. DECLARATORY RELIEF

Respondents also contend that the petitioners are not entitled to declaratory and injunctive relief because the discriminatory scheme has been prospectively cured for taxes on pensions paid in years 1989 and after.[4] However, under Wis. Stat. § 990.04, the discriminatory scheme remains in effect for ongoing enforcement of the scheme for federal pensions paid in years before 1989. App. A at 1a. The decisions of this Court are contrary to the respondents' contention. See, *e.g.*, *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890, 896 (1989) ("Texas cannot strip appellant of standing by changing the law after taking its money."); *Quern v. Mandley*, 436 U.S. 725, 733 n.7 (1978) (class action suit challenging state's administration of federal emergency assistance program not mooted by state's withdrawal from program). Moreover, this Court's decision in *Dennis v. Higgins*, —— U.S. ——, 111 S. Ct. 865, 870 (1991), makes clear that petitioners "may sue and obtain injunctive and declaratory relief" under section 1983.

U.S. 280 (1912). Alternatively, qualified immunity is only properly asserted by officials exercising discretionary functions. *Westfall v. Erwin*, 484 U.S. 292 (1988). The respondents have represented to the trial court that they have acted without discretion. TR 25. Consequently, the respondents cannot establish that they are entitled to assert the defense. *Tower*, 467 U.S. at 920-21; *Westfall*, 484 U.S. at 291 n.4.

[4] The record establishes that in excess of 5% of the class has not returned the tax for tax year 1988. TR 13. Petitioners represent that Respondent Bugher continues to enforce the scheme.

III. THERE IS NO IMPLIED REPEAL OF § 1983

In the decision below, the Wisconsin Supreme Court legislated a result which is plainly at odds with the express will of Congress and the prior pronouncements of this Court. Ignoring the important federal questions presented and the significant role of stare decisis in our system of jurisprudence, the respondents summarily reassert here that review should be denied on the basis of their policy views.[5]

The Court below concluded that a taxpayer's right to the independent remedy of section 1983 had been *impliedly* repealed by the Tax Injunction Act, 28 U.S.C. § 1341. In so ruling, it ignored the rulings of this Court which disfavor implied repeals and which require clear evidence of congressional intent to do so. *See e.g., Johnson v. Railway Express Agency*, 421 U.S. 454 (1975); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). *Cf. Johnson v. Robison*, 415 U.S. 361, 373 (1974) (clear and convincing evidence of congressional intent is required before a statute will be construed to restrict access to judicial review). *See also* Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 NYU L. Rev. 1, 27 (1985).

In carving out an exception to section 1983, premised on the Tax Injunction Act, the Court below also ignored that "the purpose of a statute includes not only what it sets out to change, *but also what it resolves to leave alone*." *West Virginia University Hospitals, Inc. v. Casey*, 111 S. Ct. 1138, 1147 (1991) (emphasis added). The Tax Injunction Act is a neutral limitation upon the

[5] The policy considerations of interference asserted here by the respondents and adopted by the court below are illusory. Respondents' real complaint is not about section 1983, but rather the breadth of the underlying constitutional rights sought to be vindicated in this case. *See* Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 NYU L. Rev. 1, 22 (1985).

jurisdiction of federal courts. It does not in any way limit the federally created right and remedy of section 1983 in state court.

Contrary to the conclusion of the Wisconsin Supreme Court, the Tax Injunction Act was specifically intended to cure the abuse of out-of-state corporations invoking the equity powers of the federal courts to interfere in state tax disputes "[a]nd all the time in this dispute there is no Federal question involved."[6] 81 Cong. Rec. 1417 (1937). *See also* S. Rep. 1035, 75th Cong., 1st Sess. 2 (1937); H.R. Rep. No. 1503, 75th Cong., 1st Sess. 2-3 (1937). Senator Bone, the legislation's sponsor, "emphasized . . . that the bill does not take away any equitable right of a taxpayer, or deprive him of a day in court." 81 Cong. Rec. 1416.

The Act's legislative history explicitly recognized that one of the existing rights of taxpayers was the exception permitting the enjoining of state and county taxes where the "tax law is invalid." H.R. Rep. No. 1503 at 2.[7] Given the unequivocal intent of Congress "*not to take away any equitable right*," it is simply inconceivable that Congress

---

[6] Respondents' contentions regarding the Tax Injunction Act are also premised upon an underlying assumption which is contrary to historical fact. At the time the Tax Injunction Act was passed, section 1983 claims such as those at issue in this case had to be brought in state court. At that time, federal courts only had jurisdiction over taxpayer section 1983 claims which satisfied, *inter alia*, the amount-in-controversy requirement. *See* H.R. Rep. No. 1503, 75th Cong., 1st Sess. 4. Accordingly, in enacting the Tax Injunction Act, Congress did nothing to alter or change the obligation of state courts to entertain taxpayer section 1983 claims similar to those in issue here since such claims were not cognizable in the federal courts in the first instance.

[7] Wisconsin law is in accord with the law left unchanged by the Tax Injunction Act. Indeed, the very case cited by the respondents contradicts their policy assertion by recognizing that Wisconsin courts "may entertain actions to enjoin state officers . . . from acting beyond their constitutional . . . powers." *Metzger v. Department of Taxation*, 35 Wis. 2d 119, 132-33, 150 N.W.2d 431 (1967).

intended to extinguish the obligations of state courts to enforce the rights expressly conferred by section 1983 or established by this Court's decisions. *See, e.g., Ex parte Young*, 209 U.S. 123 (1908); *Atchison & C. Ry. Co. v. O'Connor*, 223 U.S. 280 (1912). *Cf. Mitchum v. Foster*, 407 U.S. 225 (1972) (section 1983 is an Act of Congress that falls within the expressly authorized exception to the federal anti-injunction statute of 28 U.S.C. § 2283).[8] Indeed, if Congress intended to permit the states to impose exhaustion requirements upon section 1983, its subsequent conclusion that it was carving out a narrow exception to the non-exhaustion rule when it enacted 42 U.S.C. § 1997e was superfluous. However, it was not the province of Wisconsin to "alter the balance struck by Congress in establishing the procedural framework for bringing actions under § 1983." *Patsy v. Board of Regents*, 457 U.S. 496, 512 (1982).[9]

---

[8] There is nothing inconsistent with the enforcement of constitutional rights under section 1983 and a state's own remedial scheme. *Cf. Johnson v. Railway Express Agency*, 421 U.S. 454, 461 (1975) ("We are disinclined, in the face of congressional emphasis upon the existence and independence of the two remedies, to infer any positive preference for one over the other without a more definite expression in the legislation Congress has enacted . . . ."). This is particularly so when preferring the state scheme over section 1983 is likely to result in the subsequent assertion that the section 1983 remedy is time barred. *Id.* at 466.

[9] Respondents' reliance on their inverted analysis of the Tax Injunction Act is also misplaced. It assumes that the requisites of the Act are satisfied. The respondents have made clear that they will provide no relief unless ordered by a court to do so. TR. 5. A process, which requires that 26,000 elderly citizens separately establish that which the trial court has already found (and that which the respondents have not appealed), is suspect at best. *See Garrett v. Bamford*, 538 F.2d 63, 71 (3d Cir.), *cert. denied*, 429 U.S. 977 (1976) ("Where legal remedies require multiple suits involving identical issues against the same defendant, federal equity practice has recognized the inadequacy of the remedy and has provided a forum."). In addition, forcing these elderly citizens to exhaust an administrative process which has no subject matter jurisdiction to

In *Felder v. Casey*, 487 U.S. 131 (1988), this Court resolved that Congress has preempted state law exhaustion requirements for actions brought under section 1983. As noted by Justice Blackmun, "[o]ne of the sounder canons of judicial restraint is that once a court has spoken conclusively on a question of statutory interpretation, it should reconsider the question only when faced with compelling evidence that its initial answer was incorrect." *Individual Rights*, 60 NYU L. Rev. at 27.[10] It was error for the court below to presume to overrule *Felder* in substantial part.

CONCLUSION

For the reasons set forth in the Petition, Supplemental Brief, and this Reply, petitioners respectfully request that their petition be granted and that the decision below be reversed.

Respectfully submitted,

EUGENE O. DUFFY *
GREGORY W. LYONS
MARK S. POKER
O'NEIL, CANNON & HOLLMAN, S.C.
111 East Wisconsin Avenue
Milwaukee, WI 53202-4803
(414) 276-5000

* Counsel of Record

Attorneys for Petitioners

December 31, 1991

---

provide the relief sought under section 1983 is equally inadequate. *Direct Marketing Ass'n, Inc. v. Bennett*, 916 F.2d 1451, 1457 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1683 (1991) ("Certainty that a remedy exists is an important factor in establishing that a state court remedy is 'plain.'") (citation omitted). *See also* Hull, *Uncertainty of State Remedy May Provide Access to Federal Courts*, 1 Journal of Multistate Taxation 135 (1991).

[10] The pre-*Felder*, state court decision of *Linderkamp v. Bismarck School District No. 1*, 397 N.W.2d 76 (N.D. 1986), relied on by the Court below, certainly is not compelling evidence that this Court's initial answer was incorrect. Moreover, the result reached by the court in *Linderkamp* cannot be reconciled with this Court's decision in *Dennis v. Higgins*, 111 S. Ct. 865 (1991).

APPENDIX

EXCERPTS OF RELEVANT WISCONSIN STATUTES

1989-1990

990.01 Actions pending not defeated by repeal of statute. The repeal of a statute hereafter shall not remit, defeat or impair any civil or criminal liability for offenses committed, penalties or forfeitures incurred or rights of action accrued under such statute before the repeal thereof, whether or not in course of prosecution or action at the time of such repeal; but all such offenses, penalties, forfeitures and rights of action created by or founded on such statute, liability wherefor shall have been incurred before the time of such repeal thereof, shall be preserved and remain in force notwithstanding such repeal, unless specially and expressly remitted, abrogated or done away with by the repealing statute. And criminal prosecutions and actions at law or in equity founded upon such repealed statute, whether instituted before or after the repeal thereof, shall not be defeated or impaired by such repeal but shall, notwithstanding such repeal, proceed to judgment in the same manner and to the like purpose and effect as if the repealed statute continued in full force to the time of final judgment thereon, unless the offenses, penalties, forfeitures or rights of action on which such prosecutions or actions shall be founded shall be specially and expressly remitted, abrogated or done away with by such repealing statute.